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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 395

RICHFIELD OIL CORPORATION, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court for the Southern District of California, Central Division (R. 71), is reported in 99 F. Supp. 280.

JURISDICTION

The judgment of the district court was entered on August 3, 1951 (R. 165). The petition for appeal was filed and allowed on September 4, 1951 (R. 193, 213). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 15 U. S. C., Supp. IV, 29. Probable jurisdiction was noted on November 13, 1951 (R. 237).

QUESTIONS PRESENTED

1. Whether the evidence supports the trial court's findings that appellant entered into agreements or understandings with service station operators obligating them to meet their entire requirements of petroleum products and automotive accessories with products sold or sponsored by appellant.

2. Whether the L–O operator and appellant have a relationship analogous to agency or employment which has the effect of removing requirements contracts between them from the ban of the antitrust laws.

3. Whether the requirements contracts found by the district court violated Section 3 of the Clayton Act and Section 1 of the Sherman Act.

4. Whether the relief awarded was appropriate under the circumstances.

STATUTES INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> Section 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * [15 U. S. C. 1].

The Act of October 15, 1914, 38 Stat. 730, known as the Clayton Act, provides in part as follows:

> Section 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. [15 U. S. C. 14.]

STATEMENT

Appellant is a corporation engaged in the business of acquiring and developing oil reserves and producing, transporting, refining and marketing petroleum and petroleum products in California,

Oregon, Washington, Nevada, Idaho, Arizona, herein referred to as "the Western area" (R. 133).[1] Appellant has been enjoined by the court below from certain activities found to be in violation of Section 3 of the Clayton Act and Section 1 of the Sherman Act. Both the factual and legal bases of the district court's decision are challenged by this appeal.

The proceedings below

In April 1947, the United States filed a civil complaint charging appellant (sometimes hereinafter called "Richfield") with having entered into and operated under contracts and understandings with some 2600 service station operators located in the six states comprising "the Western area," under which the brands of petroleum products and automotive accessories to be used, sold or distributed by those stations have been specified and restricted (R. 1). The complaint sought to have the alleged exclusive supply arrangements declared void, and appellant enjoined from entering into any such arrangements in the future (R. 9–10). The complaint also sought an injunction against appellant to restrain it from cancelling leases or sales agreements with independent service station operators for the reason that such operators deal in petroleum products

[1] Appellant also does business in Texas and New Mexico, but no evidence was offered relating to activities in those states (R. 72).

or automotive accessories other than those manufactured or sponsored by appellant (*ibid.*).

The case was tried in May and June of 1951 before Judge Yankwich. On July 2, 1951, the court filed a detailed opinion, decision and order in which it determined that the charges of maintaining unlawful contracts and agreements with independent service station operators had been established (R. 71–104). The court analyzed the three different types of contractual arrangements existing between appellant and its dealers (denominated, respectively, as "L–O," "337", and "3–C") and concluded that (R. 101):

> * * * the exclusive supply agreements and oral understandings between defendant and the independent service station operators involved herein (and including L–O, 337 and 3–C types) are in unreasonable restraint of, and substantially lessen competition in, interstate commerce in petroleum products and automotive accessories, and in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act;

The court ruled that appellant should be enjoined from entering into or enforcing, or inducing or compelling independent operators (including L–O, 337 and 3–C types) to enter into, contracts or arrangements under which such operators (a) agree to buy petroleum products or automotive accessories exclusively from appel-

lant or from sources sponsored by appellant; or (b) agree that the sale by appellant of petroleum products or automotive accessories shall be subject to the condition that the operator will handle exclusively appellant's products or those sponsored by it (R. 101–2).

Proposed findings and a proposed judgment were submitted by the Government, objections were filed by appellant (R. 104), and a hearing was held on the question of the findings to be entered and relief to be ordered (R. 1974–2006). On August 2, 1951, the court filed its findings of fact, conclusions of law, and final judgment (R. 133, 163, 165).

The judgment declares illegal and void all provisions of agreements or understandings between Richfield and independent dealers operating retail outlets under an L–O, 337 or 3–C type of arrangement, which contain the condition, agreement, or understanding that the independent dealer shall purchase all of his requirements of petroleum products or automotive accessories from Richfield or its representatives (par. IV, R. 167). And Richfield is enjoined from entering into or enforcing any such contract, agreement or understanding in the future (par. V, R. 167–8).

Richfield is further enjoined from cancelling any lease now in effect with any independent dealer operating a retail outlet under an L–O

type of arrangement, except for breach of any of the written covenants contained in the lease. Richfield is forbidden to exercise the 24-hour termination clause contained in any such lease and is permitted to effect cancellation only on 30 days' written notice sent via registered mail to the dealer with a copy to the Attorney General of the United States or his representative. (Par. VI, R. 168–9.) [2]

The facts

Richfield does not have any employee-operated service stations in the Western area (Fdg. 5, R. 135; R. 581). But for many years it has leased or acquired title to service station sites and entered into contractual relations with operators of service stations for retail outlets within the Western area (Fdg. 3, R. 133). As of December 31, 1950, Richfield had contractual relations with 2,965 station operators (Fdg. 31, R. 155).

The three basic types of arrangements (L–O,

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[2] The Department of Justice is given the customary visitorial rights for the purpose of securing compliance with the judgment (par. IX, R. 169–70). The enforcement of the judgment is stayed until six months from the date of final determination of the appeal (par. VIII, R. 169). Within 60 days after judgment becomes operative, Richfield is required to give written notice by registered mail to its independent dealers of the provisions of the judgment (par. VII, R. 169). Jurisdiction of the cause is retained by the court for the purpose of any further orders which might be necessary to carry out the judgment or to modify, terminate or amend any of the provisions thereof (par. X, R. 170).

337, and 3–C) between appellant and service station operators differ in various respects, but as to each group the district court explicitly found that the operator acts as an independent businessman or contractor rather than as an employee or agent in his relationships with appellant (Fdg. 5, R. 135; Fdg. 27, R. 153–4; Concl. 4, R. 163), and that appellant and the service station operator have maintained exclusive dealing arrangements both as to petroleum products and automotive accessories. The former are Richfield products; the latter are supplied through authorized Richfield distributors, and Richfield receives a profit on their sale. (Fdgs. 12, 13, 18–20, 24, 26, 28, 29, R. 142–144, 147–8, 151, 153, 154.)

Appellant is at some pains to distinguish between its legal and actual relationship with L–O stations on the one hand and 3–C and 337 stations on the other. It seeks to demonstrate, contrary to the findings of the trial court, that it has a relationship with L–O operators which it rather vaguely describes as "analogous to the relationship of agency or to the relationship of employment for the purposes of and within the scope and meaning of the Sherman Act and the Clayton Act" (Br. 6; see Br. 73–77). Before turning to the evidence and findings as to appellant's conduct, we shall briefly describe the three classes of stations and their legal relations with appellant.

L–O stations

Under the leased-out or L–O arrangement the fee of the service station property is owned by appellant, or leased by it from a party other than the service station operator (Fdg. 6, R. 136–7). Appellant leases (or subleases) the service station property to the operator under a written lease (Gov. Ex. 1G, R. 251[3]) by the terms of which the operator is required to use the premises as a gas station, to maintain them in good order and repair, and to comply with certain other conditions. The rental is to be paid in specified monthly sums plus additional payments for each gallon of gasoline sold in excess of a specified number of gallons. (Fdgs. 7–9, R. 137–141; Gov. Ex. 1G, R. 251.)

The lease does not contain any provision dealing with the sale of petroleum products or automotive accessories, nor is there any separate written agreement on the subject between appellant and the lessee (Fdg. 6, R. 136–7). The court found, however, and appellant does not deny, that Richfield had entered into "oral contracts and understandings with the independent operators of the L–O stations, under the terms of which the independent operator is required to purchase all of the petroleum products and automotive accessories sold by him at such service station from Rich-

[3] For variations, and earlier versions of the lease form, see Gov. Exs. 1, 1A–1F, 2, R. 239–250, 253.

field" (Fdg. 6, R. 137). Richfield admits that it instructs its L–O operators prior to their "installation" that it requires them to handle Richfield's petroleum products exclusively, and to secure Richfield approved automotive accessories from Richfield's local distributor if the latter is able to supply the operator (Br. 14–15).

Breach by the lessee of any of the express conditions of the lease is ground for termination by the lessor. In addition, either party may terminate the lease on 24 hours' notice.[4] The trial court found that the 24-hour cancellation clause was never used by appellant as a means of terminating the lease for infraction of its express

[4] The habendum clause provides (Gov. Ex. 1–G, R. 251): "TO HAVE AND TO HOLD unto Lessee for the period commencing ----------, 19----, and continuing until terminated by either party by means of a written notice of election to terminate served on the other party in the manner prescribed in Paragraph '13' hereof at least twenty-four hours prior to the effective date of termination specified in such notice."

Paragraph 13, referred to in the habendum clause, merely specifies the mode of service of the notice (R. 252). The form of written lease used by appellant prior to 1941 (Gov. Ex. 1, R. 239) leased the service station property to the lessee for a minimum period of six months with a termination right in either party by written notice 30 days prior to the expiration of any six months period (Fdg. 7, R. 137). Beginning in the year 1941, however, appellant eliminated this provision from its written lease form and provided that the lease could be terminated by either party on 24 hours' notice (Gov. Ex. 1B, R. 243; Fdg. 8, R. 137). The 24-hour cancellation clause has been contained in all forms of L–O leases used by appellant after 1941 (R. 591).

conditions, but was inserted with the intent and purpose of enforcing the exclusive dealing arrangements. (Fdgs. 5, 6, 12, R. 135–7, 142–3.) Richfield admits that failure to carry Richfield's products exclusively has "warranted" terminating the tenure of an L–O operator (Br. 19). On the termination of an L–O lease, it was Richfield's policy to instruct the new lessee that he was not required to buy from the old lessee any non-Richfield products. As a result, the outgoing lessee was unable to dispose of such products to the new lessee. (Fdg. 12, R. 143; R. 1362.) Indeed, Richfield admits that it requires that the incoming operator *shall not acquire* from the outgoing operator anything but Richfield petroleum products, approved automotive accessories and service station tools (Br. 15).

Under the L–O arrangement the service station operator engages in the business of buying petroleum products and automotive accessories and reselling them at retail to the motoring public. The operator purchases and pays Richfield for the products he sells; the products are not consigned to the operator. The operator is engaged on his own account and for profit in building up a clientele of customers. He expends his personal funds in sales solicitation and neighborhood advertising; he offers trade bonuses to his customers in the form of "green stamps" which are paid for by the operator. (Fdg. 10, R. 141–2, R. 1181.)

In advertising, appellant has referred to all of its service station operators, including L–O operators, as "your independent Richfield dealer" in order to impress upon the public that the operators have a stake in their business and are not merely employees (R. 669–72).[5]

The L–O operator generally has an investment in tools, equipment, and merchandise in amounts from $1,000 to $8,000. He is responsible for his own acts and for those of any of his employees which may cause damage to the person or property of others. Appellant does not pay the lessee any wages, salary or other compensation and does not treat him as an employee for the purpose of workmen's compensation, social security, or withholding taxes. The lessee is not treated as eligible for any of the benefits of appellant's employee pension plan. (Fdgs. 10, 11, R. 141–2.) In interviewing applicants for L–O leases appellant would "check to see if they had the capital" and "impress on their minds that they were independent businessmen" (R. 973–4).

3–C stations

The 3–C arrangement is more complex in form than the L–O arrangement, but the end result is quite similar. The fee or a leasehold in the 3–C station is owned by the station operator. Under

[5] As it was put by witness King, vice president of appellant, "we do feel ourselves that these men are operating on their own" (R. 671).

the arrangement, however, Richfield takes a lease or sublease of the premises from the operator and the operator subleases them from Richfield. Thus, the 3–C dealer, like the L–O dealer, is a lessee from Richfield. And like the L–O dealer, the 3–C dealer has a separate sales arrangement with appellant, but in the 3–C case a written sales contract, which is contemporaneously executed with the lease and sublease, is employed.

Both the lease and the sublease are for specified terms but are subject to early termination on various contingencies. The lease to appellant is terminable at appellant's option in the event that the sublease is terminated.* But the operator is given no reciprocal right of termination. The sublease, in turn, may be terminated by appellant (but not by the operator) on seven days' notice in the event of cancellation of the contemporaneous sales contract (Fdg. 17, R. 146; Gov. Ex. 4D, par. 12, R. 267). The lease gives appellant the rights to erect buildings, signs, and equipment on the premises, and to paint the property. The operator-lessor agrees not to conduct on

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* Paragraph 13 of the lease (Gov. Ex. 4, R. 262, 263) provides as follows:

"In the event of any termination of that certain Operator's Lease, executed concurrently herewith by and between the parties hereto, by the terms of which Lessee herein as Lessor therein subleases the premises demised hereby to Lessor herein as Lessee therein, Lessee shall be privileged to forthwith terminate this lease by means of a notice in writing to Lessor. * * *"

premises controlled by him, if any, within 200 yards of the leased premises, any business venture from which petroleum products other than those supplied by appellant are sold or distributed. (Fdg. 15, R. 145; Gov. Ex. 4, par. 8, R. 262, 263.) Under the sublease, the operator assumes full responsibility for maintaining the premises in good order and repair and agrees to indemnify and hold appellant harmless from any claims for damage occurring upon the premises (Gov. Ex. 4D, par. 10, R. 267).

From 1945 until August 1948 (one year and four months after the filing of the complaint herein), the sales contract between appellant and the operator required the latter to purchase his entire requirements of petroleum products from appellant (Fdgs. 14, 18, 19, R. 144, 147–8; Gov. Ex. 4B, par. 1, R. 265). Appellant was given the right to paint the service station with its colors and insignia and, in the event the sales contract was cancelled prior to the stated termination date, appellant was entitled to recover all the monies so expended by it during the preceding two year period (Fdg. 18, R. 147; Gov. Ex. 4B, par. 8, R. 265).

The revised form of sales contract used by appellant in 3–C transactions since August 1948 contains the same painting provision. In place of providing in terms for the purchase of the

operator's entire requirements from appellant, the revised contract specifies minimum and maximum amounts of petroleum products which the operator is to purchase from it (Gov. Ex. 4C, par. 1, R. 266). The minimum quantities of petroleum products which the operator is required to purchase under the revised sales contract are determined by appellant and are usually fixed at 80 percent of the anticipated requirements of the operator (Fdg. 19, R. 147–8).

The trial court found that the practical and intended purpose and effect of the minimum-maximum provision is to require the operator to purchase from appellant all of the petroleum products sold by him at the service station (Fdg. 19, R. 147–8). The court also found that the written agreements between appellant and the 3–C operator had been supplemented and modified by oral agreements and understandings which provided that the operator should also secure his entire requirements of automotive accessories from or through appellant (Fdg. 20, R. 148).

Both the earlier form of sales agreement, and that in use since 1948, provide that the failure of the operator to comply with the terms of the agreement shall entitle the appellant to suspend deliveries until any breach is remedied, or to terminate the agreement forthwith (Gov. Ex. 4B, par. 7, R. 265; Gov. Ex. 4C, par. 7, R. 266).

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337 stations

Under the 337 type of arrangement, as in the 3–C arrangement, the operator holds the fee or leasehold, but there is no lease to appellant or sublease from appellant to the operator. Appellant and the operator enter a written sales agreement for petroleum products, which is usually accompanied by a painting agreement interrelated with it.

From 1937 to August 1948 the sales contract provided that the operator must purchase a specified minimum amount of petroleum products for a minimum period of one year, and also contained a maximum ceiling (Fdg. 22, R. 149; Gov. Ex. 5, R. 268). The maximum and minimum were calculated on the premise that the dealer would buy all his gasoline from Richfield (R. 1108, 1095). Appellant had the right to terminate the agreement on 5 days' notice, while the operator had no right of cancellation at all (Gov. Ex. 5, par. 5, R. 268).

The present form of 337 sales contract, which was adopted in August 1948, also contains a requirement that the operator purchase a minimum quantity of petroleum products from appellant. Under the revised form, however, either party may terminate the contract on 30 days' notice. (Fdg. 23, R. 149–151; Gov. Exs. 5D and 5G, R. 272–3, 276–7.) The minimum-maximum provision of the revised form of 337 sales contract is

comparable to the minimum-maximum provision of the 3–C contract (Fdg. 24, R. 151). The minimum requirements are determined by Richfield, and their practical and intended purpose and effect have been to require the 337 operator to secure his entire requirements of petroleum products from Richfield (*ibid.*).

The customary painting contract authorizes appellant to paint the station with its colors and insignia; it requires that at the time of termination of the sales contract by reason of any breach by the operator, the operator shall repay to Richfield the cost of the painting. (Fdg. 25, R. 151–2; Gov. Exs. 5A, 5C, 5E, 5F, R. 269, 271, 274, 275.) Until August 1948 (over a year after the filing of the complaint herein) the painting agreement required the operator to remove from the service station all signs and insignia, and upon completion of the painting not to place upon or over the painted surfaces

> any advertising sign, trade mark, insignia or any other matter without first procuring the consent and approval of Richfield [Fdg. 25, R. 153].

In the revised version of the painting agreement adopted in August 1948, the provision was modified to read as follows (*ibid.*):

> 1. That Dealer shall remove from the surface of the service station which is to be painted all signs, insignia, and obstructions, so that the obligations of Richfield

hereunder may be performed with a minimum of hindrance.

The district court found that the written sales and painting agreements have been supplemented by oral agreements that the 337 operator shall purchase all of his petroleum products and automotive accessories from or through Richfield. The court further found that the purpose and intended effect of the painting agreement is to secure an exclusive Richfield outlet, and that no painting agreement is entered into by Richfield except upon an oral exclusive dealing understanding. The obligation of the operator to pay for the cost of painting in the event the sales contract is terminated prior to the expiration of the term was intended to and has had the effect of compelling the operator to purchase exclusively from or through Richfield. The effect has been to shut out all competition for the petroleum products and automotive accessory business of the 337 operator. (Fdg. 26, R. 153.)

Appellant's exclusive dealing policy and its implementation

In June 1938 appellant inaugurated a policy of "discontinuing all split-pump resale accounts" (Gov. Ex. 9, R. 284). Henceforth, the rule was to be: "It will be 100% Richfield or we will withdraw from such accounts" (*ibid.*). This policy has never been repudiated. Witness King (vice president of appellant) could recall no instance

since 1938 in which Richfield had sold to split-pump stations (R. 1666–7); and see testimony of Bradford (R. 1039–40). The district court found that Richfield has not, in fact, since that time sold or supplied gasoline to any independent operator who has not in fact purchased all of his gasoline requirements from Richfield, regardless of the provisions of any written sales contract (Fdg. 28, R. 154).

The district court found with respect to all three classes of stations that the exclusive dealing policy was applied not only to gasoline but to other petroleum products and to automotive accessories. And it found that the policy was implemented both by oral agreements and understandings and by termination and threatened termination of agreements with operators or dealers who handled competitors' products.[7] Appellant's course of conduct in pursuing this policy is illuminated by the examples described below.

Bradford, a former district supervisor for appellant and branch manager in Portland from 1937 to 1946, testified to a systematic policing of L–O operators (R. 1072–8). His testimony reveals that an operator who did not adhere to the exclusive dealing policy would have his lease terminated whenever a replacement who would be more certain of complying with the policy could be found (R. 1073). Bradford gave

[7] Fdgs. 5, 6, 12, 18–29, 33, 47, R. 135–137, 142–3, 147–154, 155–6, 162.

examples of two instances in 1944 in which operators had their leases terminated for handling competitive products (R. 1074, 1075; see Gov. Ex. 13, R. 306).[8]

Shrewbridge, a Seattle merchandiser for appellant in 1946 and 1947, also testified concerning the policing of non-complying L–O operators (R. 989–92). Shrewbridge was instructed by his supervisor to advise two operators to get rid of competitive oils or have their leases cancelled (R. 990, 991). Shrewbridge also testified that prospective L–O operators were advised that products of Richfield's competitors were not to

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[8] The attitude of Bradford's superior, Hutchinson, toward one of these operators (Edgar) was graphically described by the witness (R. 1074–5):

"A. Well, it so happens that Mr. Hutchinson resided in the Envoy Apartments right back of this station, up, I think, on the fourth or fifth floor, and the front window of his apartment looked right down on this operation, and Mr. Hutchinson is a Richfield Oil man twenty-four hours a day, and he became very unhappy on Mr. Edgar's operation, and repeatedly I would go to the office and I would get down there somewhere around noon, ordinarily, after the sales meeting, and I would often find a note on my desk on Mr. Edgar's failure to handle Goodyear tires. He was calculating how many tires Mr. Edgar must have sold by watching his operation, and he wouldn't sit up there in the daytime, but the station was open quite late, and the note would give me an estimation on the tires that Mr. Edgar sold as against the number that was sold to Mr. Edgar by the TBA distributor, which, if I recall, would about figure 6 against 75, or something like that."

And see Gov. Ex. 12, R. 305.

be kept in the station (R. 988–9).* He stated that "it more or less, to my knowledge, was an understanding. It was more or less unwritten that he was to handle Richfield products" (R. 988).

Duarte, an Alameda, California, bulk plant commission agent for Richfield from 1938 to 1945 (R. 717), testified, with respect to L–O stations, that "We were supposed to deliver the products to the Richfield dealer and if he didn't want to buy those products, we were to put another new dealer in that would. That was their policy" (R. 721; see R. 732). He also testified that he was instructed to see that all L–O units used 100 percent Richfield products and approved accessories (R. 728).

The case of L–O operator Mills, of Alhambra, California, is illustrative of the impact of appellant's exclusive dealing policy, and of the importance of the 24-hour termination provision of the L–O sublease as the means of enforcing that policy. In 1937 Mills became an L–O operator for Richfield of a station which he had been operating since 1920 (R. 911). Richfield obtained the lease of the property through Mills' efforts (Gov. Ex. 10C, R. 303; R. 915). The original sublease to Mills (the then standard L–O form)

* When asked whether prospective operators were told "what would happen in case they did keep them" in the station, the witness replied, "Well, usually not to a prospective dealer, not to get too harsh right away with him" (R. 989).

provided for termination on 30 days' notice, which could be given only at 6 months' intervals (R. 916).

In May 1941 appellant instructed its merchandisers to replace the 6 months' termination clause contracts with the new 24-hour termination form (Gov. Ex. 10, R. 287). Appellant's Pasadena office requested that an exception be made in Mills' case because he was thought to be an exceptional dealer, and it was feared that he would take offense (Gov. Ex. 10A, R. 301). This request was rejected, the Los Angeles office advising that (Gov. Ex. 10B, R. 302):

> the management does not approve the continuance of the six months' basis in so far as Station #595 is concerned. It is felt that after this long period of time Mr. Mills should have sufficient confidence in the company to sign the new 24-hour type paper.

A further appeal, based upon Mills' history with the company and substantial investment (some $1,500) in equipment, was likewise rejected. The Los Angeles office felt that "if the matter is properly explained" there should be no difficulty in persuading Mills to accept the 24-hour basis (Gov. Ex. 10D, R. 303–4). Eventually Mills signed the new contract.

Under a special rider to the 1937 lease, Mills was permitted to sell competitive oils and accessories up to a certain percentage (R. 917). In

1943 this provision was eliminated, but Mills continued to sell competitive products which offered him a greater margin of profit (R. 919). There were complaints about this practice from the merchandiser (R. 919–20), and in November 1944 Mills was advised "that the company was not satisfied with my operation and that if I was not willing to cooperate that they would have to find somebody to take the station" (R. 922). Richfield found a buyer and Mills sold his station. At that time he had customer accounts which he had built up over a period of many years (R. 922). Mills was paid by his successor for his equipment and stock, less depreciation (R. 923).

The record shows numerous other instances in which L–O operators balked at agreeing to the 24-hour termination clause, and appellant's representatives sought to allay their fears by assuring them of appellant's good faith. Thus when Ellena, an L–O operator, inquired in 1948 about the 24-hour cancellation provision at the time he signed his lease, he was told by appellant's representative "Don't worry about it, Richfield Oil Company is a good company. You don't have to worry about that 24-hour lease" (R. 1314). Ellena was subsequently terminated in 1949 because he had handled products competitive with those manufactured or sponsored by

appellant. He was told to leave within 24 hours (R. 1316). The record shows that he then had an inventory of about $3,300, and a Coca-Cola machine which Richfield representatives had urged him to purchase, but which his successor declined to buy from him (R. 1318).

Smith, a Los Angeles L–O operator, was similarly reassigned in 1941 (R. 1404) and was similarly terminated in 1946 for failing to adhere to the exclusive dealing arrangement (R. 1410; Gov. Ex. 23A, R. 317). He gave as his reason for buying competitive products rather than those designated by appellant the fact that he was able to get better prices on such products (R. 1408). Smith had an investment in equipment and stock at his station of approximately $1,500 (R. 1405). Smith's successor declined to take over some $422 worth of Smith's merchandise which was not Richfield approved (R. 1413).

Hurst, a Portland, Oregon, L–O operator, was not told about the exclusive dealing policy of appellant or the 24-hour termination provision when he negotiated his lease in 1945 (R. 1178). After the lease was signed, appellant's representatives told Hurst that he was expected to handle only Richfield approved products (R. 1179). Thereafter, even though he could buy competitive products more cheaply from other sources, he was advised that he was required to handle appellant's approved products exclusively. He was

told that if he didn't, he "would be dumped out within 24 hours" (R. 1180). Hurst left the station in 1948 voluntarily (R. 1182, 1183). When he left, he was advised that Richfield would only require his successor to buy TBA (*i. e.*, Richfield) approved merchandise from him (R. 1183).

DeLonge, an Olympia, Washington, L-O operator from 1946 to 1947, was told by appellant's representative when he took over the station that the station was "to be my own place of business, and I was my own business manager, and as long as I operated it to the benefit of the Richfield Oil Corporation, I would be able to do as I pleased there" (R. 1257). Later, however, DeLonge was compelled to purchase Richfield approved accessories even though he didn't need them or could purchase other accessories cheaper elsewhere (R. 1262, 1265). With respect to some fan belts not approved by Richfield, DeLonge was told "Those fan belts will come off from there or somebody else will be running the station" (R. 1264). Ultimately, De Longe decided to sell. He could have sold his entire stock at the inventory price of $5,476 to a purchaser of his choice but appellant refused to permit DeLonge's purchaser to take over the station (R. 1268). DeLonge was advised that another purchaser "had been promised my station eight months prior to that time" (R. 1269).

The purchaser selected by appellant declined to buy the entire stock. Appellant's representatives, while assuring DeLonge that they were present at the negotiations "for your protection as we are for anyone else's" (R. 1270), and that they wanted "to see that everybody is satisfied on both sides" (*ibid.*), took the position that the purchaser need buy only Richfield approved products (R. 1271). DeLonge was forced to remove from the premises, and dispose of, as best he could, some $1,300 worth of stock (R. 1273). When DeLonge refused to sign a mutual termination agreement, he was told by Richfield's representatives to " 'Be out of here by 8:00 o'clock in the morning, and take all that trash with you,' indicating my stock" (R. 1273). Appellant's representative wished to get DeLonge out at midnight so "the customers won't know we are kicking him out" (R. 1273). But DeLonge was allowed to leave in the morning because the new lessee refused to take over the station at midnight (*ibid.*).

Wagner, a Taft, California, L–O operator from 1942 to 1947, had an investment of approximately $4,000 in his business (R. 1323, 1324, 1326). He had been handling products not approved by Richfield and was repeatedly cautioned about the practice (R. 1324–5). One morning when he opened his station a representative of appellant presented him with a 24-hour termination notice (Gov. Ex. 662, R. 311), saying "I warned you this

was coming if you didn't get rid of the foreign products" (R. 1326). Wagner subsequently lost about $700 on accounts receivable which he was unable to collect after he was dispossessed (R. 1328).

Delucchi, an L–O operator, testified to the following conversation with a Richfield TBA distributor in July 1949 (R. 1377):

> we talked about the Government's suit against the Standard Oil, and I told him that I would start selling whatever I wanted to.
>
> Q. What did he say to that?
>
> A. He said I couldn't, and I told him I could because the Government guaranteed that I could.
>
> Q. What was his reply?
>
> A. He says "Oh no you can't." He says, "If you do, they just won't sell you any more gas.

In 1949, a competitive supplier, Chester F. Baird of Reno, Nevada, discussed the decision of this Court in the *Standard Oil* case with Torrey, an L–O lessee, in the presence of a bulk plant manager and merchandiser for appellant, for the purpose of persuading Torrey that he was free to purchase products from sources other than appellant. He testified (R. 1531):

> Q. What was your purpose in taking that with you?
>
> A. Well, to emphasize upon them the fact that the market was open on the

Chevron [i. e. Standard Oil] stations, and it was no longer tied up.

Q. When you did that, did Mr. Hunt, the Richfield representative, make any statement?

A. Yes. They got quite a, oh, you might say, a "boot" out of it. *They kind of laughed it off, and said, "It doesn't mean anything.* It is just a matter of process, something they had to go and get done with, and it is all over with, so we will go from here." [Emphasis supplied.]

Appellant has effectively used the painting agreement, or an agreement to effect repairs, at 3–C and 337 stations as a method of inducing or coercing the dealer to adhere to the exclusive dealing policy. A 1940 memorandum from Wilson, appellant's branch manager in Seattle, gives the details of one such transaction (Gov. Ex. 9A, R. 284). Kohl, a Seattle dealer who owned his buildings and equipment and leased the land from a third party, and who was described by Wilson as being a very desirable account (R. 286), wished to have some alterations done at his station by Richfield, the cost of which would be about $2,000 (R. 285). The dealer was already on a 100 percent basis as to gasoline, but apparently was willing to agree to handle Richfield products exclusively in the new lubrication room and to eliminate all competitive canned oils from the station entirely with the exception of Pennzoil (R. 285–286). Wilson recommended that the deal be made because "if

we make the expenditure which is proposed above it will not only mean the assurance of substantial gasoline volume but will also mean that we will have a very good motor oil and grease account" (R. 286).[10]

Duarte, whose testimony in connection with L–O stations has been referred to, *supra*, p. 21, testified, on cross-examination, with respect to the appellant's intention with respect to painting agreements on 337 stations that "all I can tell you is this, that Richfield will preach to us this thing, that that painting agreement, while that station was painted Richfield colors, they asked us to tell the operator that while those Richfield colors were there and they spent money to paint it, that they shouldn't handle anything but Richfield products" (R. 730). The witness also testified that when an independent dealer sold competitive oil "he would be through buying Richfield products in that particular station" (R. 732). When asked whether it was not

[10] The financial importance of exclusive dealing is revealed by the following paragraph in the memorandum:

"When we were in the account on a split pump basis, he averaged 13,500 gallons per month. Since we took the account over on a 100% basis on February 7th, we have averaged well above 40,000 gallons per month. In August the gallonage was 47,726. When we were in the account on a split pump basis our motor oil volume averaged 7 gallons per month. Since we have been in on a 100% basis we have averaged over 55 gallons per month, all of which is still only a drop in the bucket compared to the account's total motor oil volume" (R. 284–5).

true that the independent dealers did handle competitive oils and accessories in his area, Duarte replied "Because Richfield couldn't stop them. They tried to" (R. 732).

Bradford, whose testimony has been referred to in connection with the L–O operators (*supra*, p. 19), was asked the following question with respect to dealer (337) stations (R. 1054):

> Now, in connection with the execution of the sales contract and the painting agreement with any dealer, did you, as a part of the negotiations, exact any promise on the part of the dealer that he should deal 100 percent in Richfield products?

to which he replied (R. 1055):

> Well, the only way I could answer that, *that was what we tried to do,* but one dealer might object strenuously to throwing out a lubrication set-up he had, which might be Pennzoil, or some other oil company. [Emphasis supplied.]

Bradford testified that the estimates of the maximum and minimum quantities used in 337 contracts were based on the premise that the dealer would buy all of his gasoline from Richfield (R. 1108, 1095). After hearing considerable testimony concerning the painting contracts, the district court asked Bradford whether it was not true that the painting agreement "was merely a supplement to your contract to sell them goods, to make sure that he has no other signs,

that the station itself is painted with Richfield colors and that he had no other signs selling other products?" To this, the witness replied, "That is true, yes, sir" (R. 1083).

In answer to a question as to whether 3–C deals were required to be on a "100 percent basis," Bradford replied, "They had to be 100 percent, as far as I knew" (R. 1047).[11]

Moore, a 3–C operator, testified that he was requested by appellant in 1946 to take down signs advertising competitive petroleum products, and to discontinue handling Hy Vis, a competitive oil, at his station (R. 1016). He did so, despite his desire to handle, and the financial advantage in handling, such products (*ibid.*). In 1950, Moore signed the revised form of 3–C contract which eliminated the express full requirements provision (R. 1018), but he was never told that the ruling with respect to displaying competitive signs or products was changed (R. 1024). He continued to refrain from displaying competitive signs, and although he desired to purchase Hy

[11] Appellant asserts (Br. 134, note 83 (b)) that this testimony pertained to a time when 3–C dealers "had to be 100%." We believe appellant at all times attempted to make its dealers be 100 percent Richfield customers. But if appellant intends this statement to mean that Bradford's testimony is limited to the 1945–1948 period of *written* requirements contracts, the claim is not supported by the record, which (as appellant concedes (Br. 134)) shows that Bradford was testifying as to his instructions while in Portland from 1937 to 1946.

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Vis oil, he did not do so and did not feel free to do so (R. 1020).[12]

Ogburn, a 3–C dealer in Reedville, Oregon, testified that his station was inspected in June 1949 by a Richfield representative named Froman who stated that if Ogburn took down a sign advertising a competitive oil, that he would have "a clear record" (R. 1359–1360).

Scollard was a salesman for appellant in Portland, Oregon, from 1945 to 1946, who had some 15 3–C and 337 stations under his jurisdiction. Scollard stated that he was instructed that Richfield service stations were "to handle just nothing but approved merchandise" (R. 1138).[13] He further testified as follows (R. 1139):

> Q. What did Mr. Foster say about the TBA program with respect to whether TBA should be sold to stations handling Richfield gasoline?
>
> A. Well, he was quite strict to see that that was all they handled, just approved merchandise.

McCrae was both an L–O operator and a 337 dealer. McCrae testified as to *both* types of operation that he was told by Richfield repre-

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[12] The district court indicated that it would have sustained a timely objection to the question as to whether Moore felt free to do so (R. 1020).

[13] Appellant suggests (Br. 129, note 78) that the quoted statement concerning policy applied only to L–O stations, but the record references cited for appellant's contention do not support it and no effort was made to clarify the point on cross-examination (R. 1142–44).

sentatives that he must handle Richfield or Richfield-sponsored products exclusively (R. 1225–7 (337); R. 1228–9 (L–O)).[14]

Some 25 representatives of firms selling prod-

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[14] Appellant suggests in effect that McCrae failed clearly to testify that the requirement was enforced while he was operating as a 337 dealer (Br. 134, note 83). The record, however, does not sustain the suggestion. McCrae testified (R. 1225–6):

"Q. Are you talking now about the time of the agreements?

"A. Yes, I am talking about the agreements I made with Richfield at the time [1941] I received the property lease from the property owner. [*i. e.*, became a 337 dealer]

"Q. Was it at or about that time?

"A. Yes, sir, just within a period of two weeks or so.

"Q. Who were parties you talked to?

"A. I talked to Mr. Cook and Mr. Martin, who was a branch manager at Santa Monica at that time.

"Q. Where did the conversations occur?

"A. In the station, at 3016 Main Stret.

"Q. Were there any other persons present?

"A. Mr. Vaughn was there, Benny Vaughn, branch manager of Hollywood, or the manager. He was the district manager, I believe, at that time.

"Q. Was there anything said concerning whether you could handle competitive products?

"A. They told us we were to use 100 percent Richfield approved products.

"Q. Now, at any time subsequent to this, or at the same time, did you have any conversations concerning putting in a competitive gasoline?

"A. Well, within a period, I would say, of 30 days from the time I signed the lease with Richfield, at that time the Standard station across the street was going out of business, so I wanted to handle two types of gasoline, and at that time they told me I could not, that the company had more or less an agreement that they wouldn't—"

ucts competitive with those manufactured or sponsored by appellant testified to their difficulties in selling to Richfield dealers. The bulk of the testimony related to efforts to sell to L–O stations,[15] but there was also testimony as to difficulties in selling to 3–C dealers resulting from Richfield's attitude.[16] The district court found that "In many instances direct sales representatives of manufacturers and producers have unsuccessfully attempted to sell the independent operators who were and still are parties to the written or oral agreements" (Fdg. 45, R. 161).

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[15] *E. g.*, Baker, an accessory salesman, testified that he was present at a Spokane L–O station late in 1946 or early in 1947 and heard a Richfield representative tell the operator that "if he ever caught any more Quaker State oil in that station, that he would cancel his lease immediately" (R. 1393). Brown, another accessory salesman, called on a Portland L–O dealer late in 1947 or early in 1948, and attempted to sell him accessories not approved by appellant. Brown testified that the L–O dealer told him that "he was obligated to buy from the Richfield Oil Company, that that was his understanding when he went into the station, that he had to buy their products. So I called there about three or four times, and quit calling on him" (R. 1461).

[16] Ellis, a Pennzoil salesman, R. 942–4, 963 (dealer Colmery, 1950 or 1951); Cleveland, a Christianson oil salesman, R. 1491–3 (dealer Ogburn, 1949). Ellis testified that as a result of Richfield's attitude, "practically all of my sales was under that kind of basis of a hidden capacity, no display, no signs and what have you, if I did make a sale" (R. 963). Appellant, omitting the phrase "practically all" from the above quotation, suggests that this "testimony of no display" was refuted by photographs taken at the time of trial at some Richfield stations in Ellis' territory (Br. 143).

Substantially of the interstate commerce involved

Since the interstate nature of appellant's business is not in dispute, and is fully described in the findings of the district court (Fdgs. 38–48, R. 157–163; and see Opinion, R. 73–6), we shall not repeat that description here. The substantial character of the commerce involved is indicated by the brief recapitulation below.

As of December 31, 1950, there were 1,343 L–O stations, 261 3–C stations, and 1,361 337 stations, or a total of 2,965 retail outlets in the 6-state Western area, which were subject to the agreements involved in this case.[17] There were some 7,500 agreements, oral and written, with respect to the operators of these stations, which confined the operations of the stations to dealing exclusively with Richfield products and Richfield sponsored products. These stations sold 7.56 percent of the gasoline sold by all stations in the Western area in 1950 (Def. Ex. M–5, R. 437–438). The annual volume of business done at the various types of stations is substantial. The total approximate dollar volume of business in products supplied by Richfield or its distributors at the 2,965 service-station outlets in the year 1950 was over $43,000,000.[18] In 1950, more than 248,000,000

[17] Charts set forth in the findings show the distribution of the various types of stations in the various states (Fdgs. 31, 32, R. 155).

[18] Charts showing the distribution of this amount among types of stations and products are set forth in the findings (Fdgs. 35, 37, R. 156, 157).

gallons of gasoline, and more than 3,500,000 gallons of lubricaitng oils and greases were sold at the three types of stations. (Fdgs. 31–37, R. 155–157.)

SUMMARY OF ARGUMENT

I

The district court has found that appellant had agreements or understandings with 2,965 service stations in six states by which station operators were obligated to buy their entire requirements of petroleum products and automotive accessories from appellant and distributors sponsored by appellant. It concluded that those agreements and understandings restrained and lessened competition in interstate commerce in violation of the Sherman and Clayton Acts. Appellant makes a double-barreled attack on this finding and conclusion. It seeks to divide the service stations involved into two classes. As to one class, the L–O stations, it admits that the dealers undertook to buy only products made or sponsored by appellant and contends that this exclusive dealing arrangement does not violate the antitrust laws because the dealers are to be regarded as "analogous" to agents or employees of appellant, and not as independent dealers. As to the other class, the 3–C and 337 stations, it admits that the dealers are independent but contends that the findings as to the existence of exclusive dealing arrangements are clearly erroneous and should be set aside.

A. It is not necessary to consider under what circumstances use of an "agency" arrangement may remove requirements contracts from the ban of the Sherman and Clayton Acts. For the arrangement here cannot be described as one of agency or employment. The L–O operator leases the filling station from appellant. He does not take goods on consignment; he purchases them from appellant or from distributors authorized by appellant and sells them at his own profit and risk. The dealer builds up his own trade by his own efforts, extends credit and takes credit risks, and hires and fires his own employees. He typically invests from one to eight thousand dollars of his own capital. In entering into an L–O arrangement, appellant informs the dealer that he is to be an independent businessman. In its advertising to the public, appellant describes its dealers (including L–O operators) as independent businessmen. Appellant does not have any of the legal obligations of a principal or owner; it is not liable for the torts of the dealer or his employees, does not pay withholding tax, social security tax, or unemployment compensation with respect to them, and does not enter into collective bargaining in respect of them.

Those who have established themselves as separate business entities for other purposes cannot avoid the legal consequences of their choice for antitrust purposes. *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211; *Timken Roller*

Bearing Co. v. *United States,* 341 U. S. 593. There is every reason to apply that principle here. Appellant cannot have it both ways. It cannot in the same breath assert to the public, to prospective dealers, and to state and federal tax authorities, that its dealers are independent businessmen, and deny their independence to the courts in the present proceeding.

B. Appellant's attack on the findings as to the 3–C and 337 stations is equally without merit. Those findings are amply supported by testimony that the dealers involved were prevented from displaying and selling competing products, and that salesmen of competing companies were unable to make sales to them. In addition, they are supported by undisputed evidence.

Thus it is undisputed that in 1938 appellant adopted a policy that it would sell only to stations which were "100% Richfield", and that since that time no station which carries Richfield gasoline has at the same time sold any other brand. It is undisputed that the "100% Richfield" policy has been and is applied to the L–O stations, nearly one-half of the total stations involved, through oral understandings enforced by summary termination of the underlying lease. It is also undisputed that for the years immediately prior to the filing of the complaint, and for over one year thereafter, appellant's 3–C dealers entered into express requirements contracts with appellant. It is undisputed that for the same period appellant's 337

dealers generally entered into a painting contract by which they undertook to place no signs on or against the surface of the station of which appellant disapproved—a provision whose evident purpose and effect was to render it difficult for the dealers to carry and sell competitive products.

Shortly after the district court's decision in *United States* v. *Standard Oil Co. of Calif.*, 78 F. Supp. 850, affirmed, 337 U. S. 293, appellant eliminated the express requirements provision from its 3–C contract, and the veto power on signs from its painting agreements. But there is no suggestion that, at any time, Richfield told its dealers that the "100% Richfield" policy was no longer applicable and that they were free to handle and display competing goods. And its present contracts with its 3–C and 337 dealers contain provisions requiring them to buy minimum quantities of appellant's petroleum products, which the evidence discloses and the court found were determined by appellant on the basis of approximately 80% of the dealer's anticipated requirements—a provision which plainly makes it impracticable for the dealer to sell competing products, for fear of failing to sell his fixed quota of appellant's products.

We submit that the various circumstances to which we have referred furnish ample basis for the district court's determination that there was continuing understanding and agreement that the

337 and 3–C dealers would, like the L–O dealers, confine their purchases of petroleum products to those made or sponsored by Richfield.

II

The arrangements found by the district court clearly come within the prohibitions of Section 3 of the Clayton Act as interpreted by this Court in *Standard Oil Co.* v. *United States,* 337 U. S. 293. That case held that Section 3 outlawed requirements contracts where the effect of the contract is to foreclose competition "in a substantial share of the line of commerce affected" (p. 314). The effect of the requirements contracts here is to deny to Richfield competitors access to the 2,965 filling stations involved. These stations sold 7.5% of all the gasoline sold by retail stations in the six states involved; in 1950 they distributed some $43,000,000 of petroleum products and accessories. Any argument that a business of that size is not substantial would eviscerate Section 3 of the Clayton Act by making it applicable only to the very largest companies in an industry.

The arrangements also violate Section 1 of the Sherman Act. It is unlawful *per se* to foreclose competitors from a substantial market. *International Salt Co.* v. *United States,* 332 U. S. 392; *Fashion Originators Guild* v. *Federal Trade Commission,* 312 U. S. 457. Appellant has entered into numerous exclusive dealing contracts and understandings with 2,965 independent sta-

tion operators with the intent and effect of foreclosing competitors from access to the $43,000,000 market represented by those stations.

III

The relief awarded by the district court was appropriate to remedy the evils disclosed. The injunction against entering into or enforcing any requirements contracts was clearly supported by the findings. But even if it were held that certain underlying findings lack adequate evidentiary support, the injunction should stand. It is admitted that appellant had adopted a "100% Richfield" policy in 1938 and had never since advised its dealers of any change in policy, that appellant now has and enforces understandings with its L–O dealers (nearly one-half of its total dealers) obligating them not to buy competing products; and that appellant had, for several years prior to and over one year after the filing of the complaint herein, an express full requirements contract with its 3–C dealers. On these admitted facts the United States was entitled to a general injunction prohibiting exclusive dealing contracts. For "relief, to be effective, must go beyond the narrow limits of the proven violation." *United States* v. *United States Gypsum Company*, 340 U. S. 76, 90.

Appellant objects to the provision of the decree enjoining use of the 24 hour termination clause of the L–O leases. That provision was shown to be the principal means used by appellant to enforce

compliance with the illegal requirements undertakings; its drastic nature gave it a tremendous *in terrorem* effect. So long as the leases could be terminated by appellant without cause, there could be no guaranty against sanctions being applied against L–O operators who carry competing goods. One who has been intimidated in the past needs special assurance. Appellant has not suggested any alternative means by which the L–O operators could be rendered secure from the threat of sanctions if they incurred its displeasure. If, at some future time, after the oppressive atmosphere generated by appellant's past conduct has been dissipated, it should appear that the decree is working hardship upon appellant, it will be open to it to make appropriate application to the district court. Cf. *Lorain Journal Co.* v. *United States,* 342 U. S. 143.

ARGUMENT

I. The District Court correctly held as to all types of stations involved that appellant had requirements contracts with independent dealers

The main burden of appellant's argument is that it did not enter into any requirements contracts with independent dealers. This contention has two branches. As to the L–O stations, appellant freely admits (Br. 6) the existence of understandings with the station operators that they were to buy only petroleum products and tires, batteries and accessories which were sold or sponsored by appellant, but argues that those

agreements do not offend the Shelman and Clayton Acts because the operators of those stations were not independent dealers but had a relationship with Richfield which was analogous to the relationship of employment or agency (Br. 52–95). This contention was first advanced in appellant's amendment to its answer (R. 23–24) filed June 20, 1950, about one year after this Court's decision in *Standard Oil Co.* v. *United States,* 337 U. S. 293. As to the 3–C and 337 stations, appellant's argument runs the other way; it admits that the operators of these stations were independent dealers, but denies that there were any agreements that those dealers would buy their requirements from appellant (Br. 117–148).

A. The L–O stations

In *Federal Trade Commission* v. *Curtis Company,* 260 U. S. 568, and *United States* v. *General Electric Co.,* 272 U. S. 476, this Court held that the Sherman and Clayton Acts permitted certain agreements between a principal and his agent which would not be permitted between independent businessmen. In the *Curtis* case, it sustained agreements that the agents should not sell goods of competitors; in the *General Electric* case, it sustained agreements as to the price at which the agents would sell.

It is not necessary here to consider under what circumstances agreements with a so-called "agent" may violate the antitrust laws. For

present purposes, the important thing about both the *Curtis* and *General Electric* cases is that, as the Court viewed the facts in each of them, the transaction had all the aspects of genuine agency. Thus, in *General Electric,* this Court emphasized that lamps were consigned to the agent and remained the company's property until sold, lamps unsold at the termination of the agency being returned to the company. Proceeds of sales were to be held for the company, the agent being paid a commission. The company assumed the risk of fire, flood, obsolescence, and price decline and carried whatever insurance was carried (272 U. S. at 482–483). Similarly, in the *Curtis* case, it appeared that magazines were consigned to the agent, unsold magazines being returned, and that one of the principal functions of the agent was to train and supervise a body of school boys to sell magazines in accordance with a plan developed by the company. No contention was made that this was not a genuine agency; the contention was simply that as to those agents who had formerly been independent dealers the effect of the plan had been to curtail competition.

The relationship here involved cannot conceivably be described as that of agency or employment. Appellant does not contend that the L–O operators were agents or employees within the common-law definition (cf. Br. 73). Clearly they were not. The dealers were regarded and functioned as independent businessmen. They did

not take goods on consignment; they purchased those goods for their own account. They were not paid on a commission basis; they conducted the many activities of a gasoline service station for their own profit. They had substantial capital investments, ranging from one to eight thousand dollars, in tools and equipment and stock on hand. They built up a business as a result of their own efforts, hired and fired their own employees, extended credit and took the credit risks (except in those cases in which the credit was guaranteed by the appellant through its credit-card system). When the station was sold, they took any loss on "approved" as well as "nonapproved" merchandise.

L–O dealers were held out to the general public as independent dealers. It was stipulated that in its radio advertising appellant referred to the operators of the service stations under the three arrangements (L–O, 3–C and 337) as "your independent Richfield dealer" (R. 669–672). Appellant's vice-president testified that the purpose of so doing was "to impress upon the public that these men have a stake in the business, and they are not merely employees" and stated that "we do feel ourselves that these men are operating on their own" (R. 671).[19]

[19] See also the testimony of Weston, a former merchandiser of appellant, that in interviewing a prospective L–O dealer, appellant would "check to see if they had the capital" and "impress on their minds that they were independent businessmen" (R. 973–4).

This arrangement evidently served appellant's convenience. Except for a few instances during World War II, appellant has not had any employee-operated stations (Fdg. 5, R. 135). Undoubtedly it felt that a dealer who did business at his own risk and for his own profit and who invested an appreciable amount of his own capital, would display greater initiative, responsibility and stability than would a mere employee. By such a policy appellant evidently hoped to attract a responsible group of dealers, who would have prestige in their community and would attract and retain steady customers. Moreover, as the district court found, appellant, by the arrangement which it adopted, avoided legal burdens which would have arisen under an agency or employment relationship.

Under the L–O arrangement the operator is responsible for any damage resulting from his own acts and those of his employees (*supra*, p. 12); Appellant is thereby relieved of numerous liabilities which it might have incurred under an agency or employment relationship. Appellant does not withhold any taxes for the L–O operator or his employees; and it does not pay workmen's compensation, social security or unemployment taxes in respect of the L–O operator or his employees. Appellant is subject, in respect of L–O operators and their employees, to no requirement

of collective bargaining,[20] and to no provision of minimum wage and maximum hour legislation, or of any of the other multitudinous state and federal regulations of the employee relationship. (*supra*, p. 12.)

In other words, appellant is trying to have it both ways. It has sought to have all the advantages, legal and practical, of treating the L–O station operators as independent businessmen, but when it comes to the application of the antitrust laws it seeks to avoid the consequences of the relationship into which it has entered. It asserts the legality of denying to the L–O operators the right to handle competitive goods, and thus of excluding competitors from the market represented by the "independent Richfield dealers". It seeks this result, moreover, not by urging that its L–O dealers henceforth should be treated as its agents or employees for all purposes but by insisting that, although the dealers are not agents or employees for any other purpose, they should be treated as "analogous" to agents or employees for purposes of the antitrust laws (Br. 6).

It is established law that those who choose to conduct business through the form of separate entities, cannot, for antitrust purposes, avoid the consequences of the form they have selected. This Court has repeatedly held that even common own-

[20] It may be noted in passing that it is doubtful if the 24-hour termination clause, or anything similar to it, would emerge as the result of a collective bargaining process.

ership or control of contracting or conspiring corporations does not liberate them from the impact of the antitrust laws.[21] As was aptly stated in *United States* v. *General Motors Corp.*, 121 F. 2d 376, 404 (C. A. 7), certiorari denied, 314 U. S. 618 (dealing with a conspiracy between a corporation and its wholly owned subsidiary), "Nor can the appellants enjoy the benefits of separate corporate identity and escape the consequences of an illegal combination in restraint of trade by insisting that they are in effect a single trader." In the present case, as has been shown, the separate status of the dealer is not merely a matter of form, but has substantial incidents in terms of distribution of profits and losses, liability to third persons, and relationships between the dealer and appellant.

It is true that appellant exercises control over the L–O operator in various ways, but the exercise of some control, or even complete control, by one business entity over another does not confer exemption from the antitrust laws. *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 215. The district court lucidly exposed the paradox which results from the argument that exercise of control takes agreements between con-

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[21] *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 598; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 215; *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227.

troller and controllee out of the operation of the antitrust laws (R. 80–81):

> In a sense, in this complex and interdependent world, no one is really independent. But when, through a formal and written instrument, a relationship is established by which exclusive possession and control of property is turned over to another, in exchange for a specified rental with full responsibility for the conduct of the business falling upon the lessee, with all profit or loss accruing entirely to him and not to the transferor, the relationship satisfies all the requirements of an independent enterprise. And when a corporation like Richfield deals with such an enterprise, it cannot be said to be dealing *with itself,* as though the estate it created were nothing and the person in charge, to whom possession was turned over, is a mere employee because, under clauses not contained in the contract, they supervise his actions, regulate, to some extent, his personal appearance, and do other things, some distinctly illegal * * *.

Appellant argues, however, that it created these service stations, and that consequently to deny their trade to competitors does not deprive those competitors of any market which would otherwise have been available to them (Br. 75). The argument rests on a faulty assumption of fact. The evidence indicates that some of the L–O operators had previously been dealers or had assisted ap-

pellant in getting the service station properties.[22] Moreover, L–O dealers were often told, when they first took over a station, that they were to act as independent businessmen;[23] very possibly they would not have taken the station on any other basis. And this record shows that, even despite the unlawful exclusive dealing commitments, and coercion by appellant, the L–O dealers have in fact offered a substantial market for competitive petroleum products and accessories, a market which has been vigorously pursued by competitors (*supra*, pp. 18–28).

But appellant's argument is subject to more basic objections than failure of proof. In the first place, the "creation" of an independent business entity does not give the creator a permanent license to make agreements with it restraining trade. As has been pointed out, a corporation may not conspire or contract to restrain trade even with its wholly owned subsidiary. Surely, the lessees here are less the creatures of Richfield than is such a subsidiary.[24]

[22] Thus, Mills had operated his station for 17 years before he entered into an L–O arrangement with appellant, and appellant obtained the lease of the station through his efforts. See pp. 21–23, *supra*.

[23] See testimony of Bradford, Hurst and DeLonge, *supra*, pp. 19, 24–26, and of Weston, *supra*, p. 45 n. 19.

[24] It might be true in a literal sense that an inventor creates something new which would not have existed but for him; this fact, however, does not give him a license to use the invention to restrain trade, except within the precise terms of the patent grant. *United States* v. *Masonite Corp.*, 316 U. S. 265.

Second, it does not follow that if Richfield had not built the stations it did, no one else would have filled the vacuum. At least some of those who have become L–O operators would presumably have become independent dealers by some other means if Richfield had not offered them the opportunity of operating stations of their own. It is therefore unrealistic to suggest that the demand created by Richfield-built stations is a demand in which Richfield has a proprietary interest. And, under such a theory, the history of each station would be determinative (presumably indefinitely) of the extent to which it could lawfully enter exclusive dealing contracts. The former independent taken over by Richfield on an L–O basis would be classified "independent" and Richfield could not lawfully agree to sell to it on an exclusive basis. On the other hand, the station which was built by Richfield and leased out (or even sold) to an independent dealer would presumably be a "Richfield" station, and agreements between it and appellant restraining trade would be outside the antitrust laws. It seems unnecessary to labor the absurdity and impracticality of this result.[25]

[25] It is surprising that appellant does not contend that the 3–C stations are also within its private selling province. They, too, are leased by Richfield to the operator. It is true that the operator is usually the owner of the fee, but that would seem to be irrelevant to Richfield's theory, because Richfield is not necessarily the owner of the fee of the L–O station. Is a station that Richfield leases from A and subleases to B any less a "natural" market for Richfield products than a station which Richfield leases from A and subleases to A?

In *United States* v. *Masonite Corp.*, 316 U. S. 265, 280, this Court observed in connection with an effort to use a *del credere* agency device to avoid the impact of the Sherman Act that "the result must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade." In the present case the significance of appellant's business practices with respect to its L–O stations is that 1,343 individual retail businesses are withdrawn from the general market for petroleum products and automotive accessories, except to the extent that they can enter that market surreptitiously.

B. The 3–C and 337 stations

As to the 3–C and 337 stations, appellant admits that the dealers were independent businessmen but contends that the findings that those dealers agreed to fill their entire requirements with Richfield or Richfield-sponsored products are "clearly erroneous" (F. R. C. P. Rule 52 (a)) and should be set aside (Br. 117–143). Appellant challenges many of the findings of fact in detail, and invites this Court to undertake a minute examination of the evidence to test their correctness. Although we believe that the evidence set forth in the Statement, *supra*, shows that here, as in *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 597, appellant's

"lengthy brief has failed to establish that there was error in making any crucial, or even important, ultimate or subsidiary finding," we think that facts which are substantially undisputed go far toward sustaining the essence of the challenged findings.

It is not disputed that in June 1938 appellant inaugurated a policy of "discontinuing all split-pump resale accounts" so as to sell only to stations that were "100% Richfield" (Gov. Ex. 9, R. 284). It is undisputed that at no time since has any Richfield dealer (L–O, 3–C or 337) carried any other brand of gasoline while carrying Richfield gasoline (Appellant's Br. 119).[26]

[26] Appellant asserts that this unanimity of its dealers is due to voluntary choice by the dealers, and to the fact that appellant has never solicited the business of the small minority of existing dealers operating split pump stations (Br. 136–138). Apparently, however, appellant in its business practices had less faith in this voluntary tendency of dealers to carry only one brand of gasoline than it displays in its brief. For it is undisputed that appellant now requires the L–O dealers to agree not to carry competing gasoline; that it had a written requirements contract with its 3–C operators until after the district court's decision in the *Standard Oil* case outlawing such contracts; and that it presently enters into agreements—the minimum-maximum agreement and the painting contract—which the district court found had the purpose and effect of requiring adherence to its "100% Richfield" policy.

Needless to say, the decree below does not prevent dealers from handling only Richfield products by voluntary choice. Cf. *Standard Oil Co. of Calif.* v. *United States*, 337 U. S. 293, 313–314. It merely enjoins any *agreement* between appellant and its dealers tending to require adherence of dealers to such a policy.

It is also, we think, not seriously open to dispute that as to petroleum products this "100% Richfield" policy was applied until August 1948 at all three types of stations. In the case of the 3–C stations this was done by an express full requirements contract. In the case of the 337 stations there was no express full requirements contract, but there were an express maximum-minimum contract and a painting contract which gave Richfield the express right to forbid display on the surface of the station of any signs of which it disapproved. In the case of L–O stations the "100% Richfield" policy was not reflected in any written agreement, but it is undisputed that it was universally imposed, and has been policed through use of the 24-hour termination provision (*supra,* p. 42).

On June 7, 1948, the District Court for the Southern District of California rendered its decision in *United States* v. *Standard Oil Co. of Calif.,* 78 F. Supp. 850, affirmed, 337 U. S. 293, and on June 30, 1948, it entered a decree enjoining enforcement of any oral or written requirements contract by Standard in the Western area. Shortly after that decision, appellant made certain changes in the contracts with its dealers to eliminate certain provisions which on their face were clearly illegal. Appellant does not contend, however, that as to its L–O stations, which constituted nearly one-half of its total number of stations (Fdg. 31, R. 155), it made any departure

from the previous "100% Richfield" policy. Nor does it contend that it ever told any 3–C or 337 dealer that the former policy had been ended as to 3–C or 337 stations, and that such stations were now free to distribute competing products. Cf. pp. 26–28, *supra*. On the contrary, the record demonstrates that appellant has tried to continue the former policy so far as that could be done without overt and obvious illegality.

In deference to the *Standard Oil* decision appellant did, in August, 1948, one year and four months after the complaint in this case was filed, eliminate from its written sales contracts applicable to 3–C stations any express full requirements provision. Prior to that time, Section 1 of the 3–C sales contract expressly provided that the operator agreed to buy his "entire requirements" of petroleum products (gasoline, lubricating oils and greases) from Richfield; he also undertook to buy, and Richfield to sell, stated monthly minima (Fdg. 18, R. 147). Thereafter Section 1 was amended to provide merely that the operator agreed to buy, and Richfield to sell, stated monthly maximum and minimum quantities of petroleum products (Fdg. 19, R. 148). Thus the 3–C sales contract took essentially the same form in this respect as did the 337 contract.[27]

[27] In August, 1948, appellant also changed its 337 sales contract (Fdgs. 22, 23, R. 149–150) so as to permit changes in amounts based on abnormal climatic or other conditions and to give appellant the right in its absolute discretion and without liability to restrict and curtail deliveries.

The district court found that the maximum-minimum provisions of both the 3–C sales contract as thus revised, and the 337 sales contract, had the practical and intended effect of requiring the operator to buy all his requirements of petroleum products from Richfield (Fdgs. 19, 24, R. 148, 151). We think it is evident that that finding is correct. As the court found, the minimum figures were set at about 80% of the operator's anticipated requirements. The maxima and minima were set by appellant and there was uncontradicted testimony that they were set on the assumption that the dealer would buy all his requirements from Richfield.

We see very little difference, so far as effect on competition is concerned, between an agreement compelling a dealer to buy 100% of his requirements and one compelling him to buy 80% of his requirements. In either event, such a contract renders it unlikely that the operator will ever be in a position to buy competing products, except sporadically and occasionally. In order to be sure that he would not become overstocked, the dealer would have to sell his entire agreed quota—80% of his past sales for the period—before selling any competitive products. Stocking competitive products under such circumstances would hardly be worth the trouble. And while a seller may have a legitimate interest in fixing, within limits, the quantity of future deliveries to which he is committed, the use of a

substantial percentage of the purchaser's requirements as the yardstick plainly imports an intention to deny the purchaser's custom to others.

This conclusion is reinforced by the use which Richfield has made of such maximum-minimum contracts. As the district court found, a similar maximum-minimum form of sale contract was in force as to 3–C stations (then known as 2–B stations) from 1937 to 1944 (Fdgs. 24, 13, R. 151, 143) and as to 337 stations from 1937 to 1948, during which period the "100% Richfield" policy was in effect as to all kinds of stations.

The lack of any intent to abandon the "100% Richfield" policy is also indicated by the fact that no change was made in the underlying lease from the 3–C station operator to Richfield. Since August, 1948, as before, that lease has provided that the lessor-operator

> agrees not to conduct or permit to be conducted on premises controlled by Lessor, if any, within two hundred (200) yards of the premises demised and leased, any business venture from which petroleum products other than those supplied by Lessee are sold or distributed. [Par. 8, Fdg. 15, R. 145.]

For breach of this covenant Richfield could terminate the lease after 30 days (par. 10, Gov. Ex. 4, R. 263). This express prohibition of the sale of non-Richfield products from premises within 200 yards of the leased station, even if

it does not of its own force import an exclusive dealing requirement as to the leased station, is explainable only on the assumption that the operator is committed to selling exclusively Richfield products from the leased station.

The other principal change made in August, 1948, was in the painting contract applicable to the 337 stations. Prior to August, 1948, the 337 station painting contract provided that the dealer shall remove all insignia from the surface of the stations and, after the station is painted in Richfield's distinctive colors, "shall not place upon or over the painted surfaces any advertising signs, trade mark, insignia or any other matter without first procuring the consent and approval of Richfield" (Fdg. 25, R. 152–153). As one of appellant's branch managers admitted, the purpose of such a painting agreement was to make sure that the station "had no other signs selling other products" (Bradford, R. 1083). Indeed, the necessary purpose and effect of such a provision is to discourage sale of competing goods, since filling station sales depend in large measure on ability to attract the passing motorist by prominent signs and advertising displays. After the *Standard Oil* decision, the provision calling for Richfield's approval of insignia was eliminated; the contract continued, however, to require the operator to remove all signs and insignia prior to painting (Fdg. 25, R. 153). Thus, while its

language is less explicit, it strongly tends in the same direction as before.[28]

With respect to T. B. A. (tires, batteries, and accessories) there was no written agreement with any dealer. Appellant does not dispute, however, that the "100% Richfield" policy was applied to T. B. A. sale by L–O dealers, and the record shows that it was vigorously policed and vigorously enforced. The district court found that it was also applied to 3–C and 337 stations, both before and after the *Standard Oil* decision was rendered by the district court; we have set out in the Statement, *supra,* pp. 18–34, some of the evidence supporting those findings. That evidence includes substantial testimony by 3–C and 337 dealers, and by salesmen to such dealers, that the "100% Richfield" policy was insisted on and that competing salesmen found it difficult to make sales.

Appellant argues that the policy was not wholly successful and that many 3–C and 337 dealers did handle some competing oils and accessories. But it has never been the law that only those schemes to violate the Sherman Act which are completely successful can be enjoined. The eco-

[28] 337 dealers generally entered into such painting contracts. Appellant admits that of 1,361 sales contracts in effect with 337 dealers as of December 31, 1950, 853, or over 60%, were made *concurrently* with painting contracts (Br. 142). Other dealers entered into painting contracts after the sales contract was signed.

nomic advantages to the dealers of carrying competing products would seem to have been so strong that no exclusive dealing policy could be fully enforced. Thus many L–O dealers, to whom appellant concedes that the "100% Richfield" policy was applied, persisted in handling competing products notwithstanding appellant's vigorous policing and frequent use of the drastic 24-hour termination clause to enforce exclusive dealing. (See pp. 18–28, *supra.*) Frequently sales to Richfield stations were made on a "hidden capacity, no display, no signs" basis (see p. 34, n. 16, *supra*).[29] The fact that the "100% Richfield" policy could not be made wholly effective hardly establishes that there were no exclusive dealing agreements in effect, or that those agreements did not result in a considerable, although less than complete, elimination of competition.

II. Appellant's exclusive dealing arrangements and agreements violate the Clayton and Sherman acts

A. Section 3 of the Clayton act

The section provides in relevant part:

> it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, ma-

[29] The secrecy to which dealers desiring to defy appellant's policy often felt it necessary to resort strongly suggests that the clandestine action was motivated by the fact that the handling of competitive products was contrary to agreements or understandings between appellant and the dealer.

> chinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller, *where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition* or tend to create a monopoly in any line of commerce. [Emphasis supplied.]

The conclusion of the court below that appellant's exclusive dealing contracts and understandings with the three classes of stations violate the above section cannot seriously be questioned in view of the controlling decision of this Court in *Standard Oil Company of California* v. *United States*, 337 U. S. 293. In the *Standard Oil* case full requirements contracts between Standard and some 6,000 independent stations in the Western area were held unlawful under Section 3. The Court's opinion pointed out (pp. 297–8) that the contracts obviously would violate the section unless excepted by the qualifying clause italicized above. It then exhaustively reviewed the prior cases interpreting the section, analyzed the character of proof necessary to meet the test of substantiality, and concluded as follows (p. 314):

> We conclude, therefore, that the qualifying clause of § 3 is satisfied by proof that

> competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, and it is clear that the affected proportion of retail sales of petroleum products is substantial. In view of the widespread adoption of such contracts by Standard's competitors and the availability of alternative ways of obtaining an assured market, evidence that competitive activity has not actually declined is inconclusive. Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of § 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity.

In Point I, *supra,* it was demonstrated that the 1,343 L–O dealers here involved were correctly found by the court below to be independent businessmen. The remaining 1,622 3–C and 337 dealers are admittedly independent. And it was demonstrated that the findings of exclusive dealing contracts and arrangement between appellant and its dealers are fully sustained by the evidence. It thus becomes clear that the facts here are very similar to those in the *Standard Oil* case. In each case an oil company has maintained exclusive dealing contracts as to petroleum products and

automotive accessories with numerous independent retail outlets.

Appellant suggests that this case may be distinguished from the *Standard Oil* case on the basis of the substantiality of the commerce involved (Br. 104–108, 149). We submit that the distinction is frivolous. To be sure, Standard is bigger than Richfield, and if market dominance were the test the difference in size between the two might be material. The test of market dominance, however, was specifically rejected in the *Standard Oil* case; indeed had it been accepted the case would have had a different outcome, since the Court noted that "Standard's share of the retail market for gasoline, even including sales through company-owned stations, is hardly large enough to conclude as a matter of law that it occupies a dominant position, nor did the trial court so find" (337 U. S. at 302).

The test, then, is one of substantiality of the share of the line of commerce affected (*supra,* pp. 61–62). Here 2,965 retail outlets subject to some 7,500 unlawful agreements, oral and written, handle some 248,000,000 gallons of gasoline, and 3,500,000 gallons of lubricating oils and grease annually. In 1950 the approximate dollar volume of business in products supplied by Richfield or its distributors to the stations here involved was $43,000,000. And the 2,965 stations sold 7.56 percent of the gasoline sold by all stations in the Western area in 1950. (*Supra,* pp. 34–35). It is ob-

vious that this is a substantial share by any reasonable standard.

If appellant's contention that it is permissible for it to use requirements contracts were accepted, it would follow that other suppliers might do the same, since what is lawful for Richfield is lawful for others similarly situated.[30] Yet it is obvious that if all the suppliers smaller than Standard were allowed to use requirements contracts, the cumulative impact upon competition would be far greater than would result from such use by Standard alone. If appellant's view were to prevail generally, Section 3 of the Clayton Act would be rendered virtually nugatory in respect of requirements contracts because it would apply only to the very largest suppliers in an industry. We submit that such a result cannot be justified under the statute.

B. Section 1 of the Sherman act

The court below held that appellant's contracts and understandings are in violation of Section 1 of the Sherman Act, as well as Section 3 of the Clayton Act (Concl. 2, R. 163; Judgment, par. II, R. 167). As that holding is not necessary to sustain the judgment, and as this Court found it unnecessary to reach the Sherman Act question

[30] In the *Standard Oil* case, *supra*, it was noted that "all the other [i. e. other than Standard] major suppliers have also been using requirements contracts" (p. 309).

in the parallel *Standard Oil* case, that question will be discussed only briefly here.[31]

Appellant points out that not all restraints are unreasonable, and suggests that the record herein is deficient in proof to establish the various elements necessary to show unreasonableness here (Br. 95–107). Appellant further suggests (Br. 98), and the Government agrees, that the district court has in effect held the restraints here imposed to be unreasonable *per se*.

This Court has held that it is unreasonable *per se* to foreclose competitors from any substantial market. *International Salt Co.* v. *United States*, 332 U. S. 392; *United States* v. *Yellow Cab Co.*, 332 U. S. 218. It is "unlawful to exclude from the market any of those who supply it", *Fashion Originators Guild* v. *Federal Trade Commission*, 114 F. 2d 80, 85 (C. A. 2), affirmed, 312 U. S. 457. The exclusive dealing arrangements here are designed to foreclose competing oil companies, and competing manufacturers and distributors of automotive accessories, from the very substantial market represented by 2,965 retail gasoline stations. The substantiality of the commerce involved, both dollarwise and percentagewise, cannot seriously be disputed.

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[31] For a fuller discussion of this question, the attention of the Court is invited to pages 25 to 41 of the Brief for the United States in the *Standard Oil* case (Oct. T. 1948, No. 279).

It is of course true that all restraints do not fall in the *per se* class, and that it has been held that exclusive dealing brought about by vertical integration is not always illegal *per se*. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 523. In the *Columbia Steel* case this Court upheld an acquisition of assets of a steel fabricating company as a step in vertical integration of steel producing and fabricating facilities, despite the fact that the acquired facilities would be supplied exclusively with steel produced by the acquiring companies. But the Court did not suggest that exclusive dealing contracts were never unreasonable *per se*. To the contrary, the Court approved the holding of *United States* v. *Yellow Cab Co.*, 332 U. S. 218, and quoted with apparent approval (p. 521) the following excerpt from that opinion (332 U. S. at 226–7):

> Nor can it be doubted that combinations and conspiracies of the type alleged in this case fall within the ban of the Sherman Act. By excluding all cab manufacturers other than CCM from that part of the market represented by the cab operating companies under their control, the appellees effectively limit the outlets through which cabs may be sold in interstate commerce. Limitations of that nature have been condemned time and again as violative of the Act. *Associated Press* v. *United States*, 326 U. S. 1, 18–19, and cases cited. In addition, by preventing the cab

> operating companies under their control from purchasing cabs from manufacturers other than CCM, the appellees deny those companies the oportunity to purchase cabs in a free, competitive market. The Sherman Act has never been thought to sanction such a conspiracy to restrain the free purchase of goods in interstate commerce.

In the *Columbia Steel* case the Court pointed out that in the *Yellow Cab* case there was an intent to monopolize the taxicab business in four cities (p. 522). Here there are express findings of an intent on the part of appellant to confine the independent operators of the 2,965 retail stations to the particular products and automotive accessories handled or sponsored by Richfield, to deny to them access to competitive products, and to deny to competitive manufacturers and suppliers of petroleum and automotive accessories access to this substantial group of independent retail outlets (Fdgs. 12, 13, 19, 24, 26, 28, 29, 47, R. 142, 143–4, 147–8, 151, 153, 154, 162; Concls. 6–9, R. 164–5).

It is important to note that the *Columbia Steel* case did not present the issue of the lawfulness or unlawfulness of exclusive dealing arrangements between independent suppliers and retailers. It dealt with the question of the permissibility of a particular vertical integration. Here appellant does not seek to integrate, but to restrain the trade of 2,965 independent businessmen.

Where, as here, the commerce involved is quantitatively and proportionately substantial (*supra*, pp. 34–35, 63), and the freedom of numerous independent merchants and their potential suppliers is restrained, we believe that exclusive dealing contracts between a supplier and such merchants are illegal *per se* and violate Section 1.

III. The relief ordered by the district court was proper

The judgment of the district court provides relief which is necessary and appropriate to prevent repetition of appellant's unlawful conduct in the future. The court was fully justified in outlawing all exclusive dealing agreements or understandings between appellant and independent retail dealers (pars. IV, V, R. 167–8). As we have pointed out (*supra*, Point I), its findings that such agreements and understandings were and are in effect as to each type of station are amply supported. But even if appellant's attacks on the findings could prevail, the relief awarded would still be wholly justified by the undisputed facts.

Appellant does not deny that the "100% Richfield" policy, which it admittedly adopted in 1938, has been and is being applied in full vigor to the L–O stations, through oral understandings enforced by use of the 24-hour termination clause. It does not deny that during the years immedi-

ately preceding the filing of the complaint herein and for over one year thereafter it had in effect an express full requirements contract as to its 3–C stations.[32] The L–O and 3–C stations constitute over one-half of the service station outlets which are the subject of this action.[33] In addition, the written maximum-minimum provisions and painting provisions presently applicable to both 3–C and 337 stations on their face—and quite apart from the testimony as to their practical effect which appellant disputes—plainly tend, as the district court held, to compel exclusive dealing.[34]

Even if Richfield had entered into illegal exclusive dealing agreements with less than all of the retail outlets for its products, injunctive relief against that practice need not be confined to the particular dealers who hitherto have been tied to Richfield in this manner. This Court has repeatedly recognized that equity need not bar only the travelled roads to illegal objectives, and that

[32] Even if appellant had discontinued its unlawful conduct entirely in 1948, the court's power and duty to order injunctive relief could not be defeated. *Federal Trade Commission* v. *Goodyear Tire & R. Co.*, 304 U. S. 257; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 309, 310. Indeed, even "cessation of an unlawful activity *before* suit does not deprive the court of jurisdiction to provide against its resumption." *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (C. A. 2). [Emphasis supplied.]

[33] On December 31, 1950, there were 1,343 L–O stations, 261 3–C stations, and 1,361 337 stations (Fdg. 31, R. 155).

[34] See also the covenant against selling competing products within 200 yards of the station, presently contained in appellant's 3–C lease.

"relief, to be effective, must go beyond the narrow limits of the proven violation." *United States* v. *United States Gypsum Company,* 340 U. S. 76, 90; *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 600. See *International Salt Co.* v. *United States,* 332 U. S. 392, 400; *Local 167* v. *United States,* 291 U. S. 293, 299; *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461; *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 409.

Appellant complains of the failure to include in the decree a provision permitting it to sell its products, or those sponsored by it, on the condition that the containers for such products, where furnished by Richfield and marked as such, shall be used solely for Richfield products. There is no basis in the record for a conclusion that Richfield dealers have sought in the past to palm off competitors' products as Richfield's, or are likely to do so in the future. Absent such a showing, it cannot be said that the trial court abused its discretion in refusing to include the provision.[35]

[35] The inclusion of such a provision in the judgment in the *Standard Oil Co. of California* case (see Appellant's Br. 116) is not binding as to the appropriate relief in another case arising on a different record. And there was no consent judgment here which tied the relief to be awarded to the outcome of the *Standard* case. Cf. *Ford Motor Co.* v. *United States,* 335 U. S. 303. Nor does appellant indicate how it will be prejudiced in competition with Standard by the difference in the two decrees, or the precise nature of the "important competitive marketing practices" which Standard may continue to utilize (cf. Br. 116).

Should appellant at any time in the future be injured by deception of the public in this manner, it will of course be free to seek modification.

Appellant also complains of the terms of Paragraph VI of the decree (R. 168) which enjoins use of the 24-hour termination clause in the L–O lease, and permits appellant to terminate its L–O leases only for breach of the express conditions contained therein and upon a minimum of 30 days written notice.

We submit that the mode of relief chosen by the district court is an appropriate method of eliminating the *in terrorem* effect of the unrestricted cancellation power. The record establishes that appellant has frequently used summary termination, or the threat of it, as a principal method of enforcing its exclusive dealing policy (*supra,* pp. 18–28). If appellant remains free to terminate an L–O lease with substantially no notice for any reason (or for no reason), it is obvious that the prudent L–O operator will continue to feel under compulsion to comply with Richfield's known wish that he should handle its products and those sponsored by it exclusively.

Appellant does not suggest how the injunction could have been drawn more narrowly so as to preserve intact its 24-hour termination privilege, and at the same time to prevent the use of that privilege as a coercive weapon to accomplish the illegal result for which it has been used in the

past. It seems plain that an injunction against termination for the reason that the operator has handled the products of competitors would be totally inadequate because it could be so easily evaded and thus would give the operator no assurance that he could safely risk appellant's displeasure. If appellant has unfettered discretion to cancel on any ground except the handling of competitors' products, the L–O operator would reasonably feel that he must not risk antagonizing Richfield by selling the products of other oil companies. For cancellation of a lease could almost always be plausibly based upon some other ground, and contradictory proof of a particular motive is always difficult.

In view of the course of dealings with the L–O operator in which the termination power has been used coercively by appellant, the district court obviously deemed it essential to give him a tenure not resting upon keeping Richfield's goodwill if he was to act with any real independence. Persons who have been intimidated require extra assurance against reprisals if they are to function freely.[26]

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[26] If the L–O lessee is not given complete protection against a constant threat of lease cancellation, such as is given the lessee in paragraph VI of the decree, will not the L–O lessees continue to say to competitive suppliers, as did L–O lessee Locke to a competitive supplier in 1949: "* * * he couldn't see why he should jeopardize himself, why he should handle our products on the outside" (R. 1510)? And will not the L–O lessees continue to act in fear of appellant's sword of

Appellant urges that the effect of the decree is confiscatory (Br. 113–114). As to the 510 L–O stations which Richfield owns in fee, it is said that Richfield is enjoined for the lives of the present operators from obtaining their fair rental value. As to the remaining 833 L–O stations which Richfield leases from other persons and subleases to the operator, it is argued that Richfield is compelled for the duration of the underlying leases to absorb as a penalty the difference between the rents payable by it and the lower rent which the L–O station pays.

There are several answers to these contentions. In the first place, the terms of the lease, including the size of the rental and the express grounds for termination, were written by Richfield, and it can hardly be argued that their continued enforcement is in the nature of a penalty. As to those provisions Richfield is getting that for which it bargained. And it cannot complain of the deletion of a clause which was designed to be and has been the instrument of unlawful ends. When Richfield inserted the 24 hour clause, which the

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Damocles, as did dealer Colmery when he told a competitive supplier: "* * * if the Richfield Oil Company wanted to, there was probably other reasons in my lease so that they could eliminate me from the properties" (R. 1200)? And see R. 964, where a competitive supplier testified that Colmery told him that if he handled Pennzoil, Richfield would find some excuse to get rid of him. And the supplier added that "I get that statement from so many stations, counsel, that I just can't remember where I get them all (*ibid.*).

district court has found to have been inserted and used in furtherance of the illegal purpose of enforcing exclusive dealing arrangements, Richfield took the risk that the clause would be declared void and the other provisions of the lease would remain in force.

Second, antitrust decrees approved by this Court have frequently imposed restrictions upon the use of property which inevitably affect its value to its owners. Divestiture, which requires one to sell what he does not wish to sell, deprives the property owner of one of the basic privileges of ownership.[37] Compulsory patent licensing deprives the patentee of the basic privilege of using his patented invention to the exclusion of all others, and may force the patentee to accept royalties not fixed by himself.[38] For a news gathering service to be forced to accept as subscribers newspapers not of its choice removes one of the basic privileges of businesses other than public utilities.[39] But the relief necessary to terminate illegal conduct and dissipate its consequences is awarded even though some incidental injury is suffered by the violators. Here the contractual right of a lessor to terminate leases has been used to enforce unlawful agreements, and therefore must be limited.

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[37] *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131.

[38] *Hartford Empire Co.* v. *United States*, 323 U. S. 386; *United States* v. *National Lead Co.*, 332 U. S. 319.

[39] *Associated Press* v. *United States*, 326 U. S. 1.

Third, if future events should render unduly oppressive the continuation of the leases on their present terms, appellant is free to seek modification of the decree from the district court, which has retained jurisdiction of the cause for just such purposes (Par. X, R. 170). Appellant would also be free at that time to attempt to show to the satisfaction of the trial court that the atmosphere of coercion under which its L–O operators have functioned has been dissipated, and that the market represented by these dealers, which is now closed by appellant's illegal restraints, has successfully been pried open to competition. Cf. *International Salt Co.* v. *United States,* 332 U. S. 392, 401. Here, as in *Lorain Journal Co.* v. *United States,* 342 U. S. 143, the decree is reasonably consistent with the requirements of the case, and modifications, if any, should be left to the informed discretion of the district court "in the light of the entire proceedings and of subsequent events" (*id.* at 157).

CONCLUSION

For the foregoing reasons the judgment should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 395.

RICHFIELD OIL CORPORATION, *Appellant*,

v.

UNITED STATES OF AMERICA.

APPELLANT'S REPLY BRIEF.

Appellant, Richfield Oil Corporation, presents the following Reply Brief:[1]

For clarity, Richfield's comments concerning the Government's brief will be arranged according to the same plan as in Richfield's opening brief.

I.

THE L. O. STATIONS.

A. Whether the L. O. Stations as Operated by the L. O. Operators are a Legitimate Market for Richfield's Competitors.

Richfield has asserted that the L. O. stations are not a legitimate market for the products of Richfield's competitors but that those stations are merely outlets lawfully controlled by Richfield for sale of its products to a market,

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[1] Our opening brief will be referred to as Rich. Br. The brief of the United States will be referred to as Govt. Br. The Record is referred to as R. Emphasis throughout this brief has been supplied.

i.e., the motoring public. In support of such assertion, Richfield has shown that the underlying reason for the exclusion of employment, agency, and other intimate relationships from the prohibitions of the anti-trust laws is that in the presence of such relationships there is no independent businessman status and no legitimate market or subject matter of competition; that in terms of restraint of trade, the relationship between Richfield and the L. O. operators contains the same attributes as a relationship of agency or employment; and that for purposes of the anti-trust laws, the relationship of the L. O. operators to Richfield more nearly resembles those of agency or employment or other "intimate relationships" rather than that of an independent businessman who is a customer of and part of a market for Richfield and its competitors [Rich. Br., pp. 52-77].

In opposition to such contentions the government advances five arguments. None of them answers Richfield's claims. Each will be dealt with separately.

(1) The government states: "The relationship here involved cannot conceivably be described as that of agency or employment" [Govt. Br. 44]; and the government points out that both *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, and *United States* v. *General Electric Co.*, 272 U. S. 476, involved agreements between a principal and agents [Govt. Br. 43-4].

That such statements do not answer Richfield's contentions need not be labored. No mention is made by the government of the "intimate relationships" other than employment or agency, referred to in Richfield's brief, which disclose that the area excluded from coverage by the anti-trust laws is broader than that of strict agency or employment. No mention is made by the government of the facts and circumstances bearing upon Richfield's relationship with the L. O. stations and the L. O. operators which clearly demonstrate that such "intimate relationship" is here present and that the L. O. operators are not customers and that

the stations are not a legitimate market for Richfield's competitors.

The government's brief states: "It is not necessary here to consider under what circumstances agreements with a so-called 'agent' may violate the antitrust laws". [Govt. Br. 43] Why the government feels it unnecessary to consider such circumstances is not explained. By avoiding such consideration the government shuts its eyes to the most important legal issue in this litigation with regard to the L. O. stations, which issue was raised in the pleadings before trial [R. 23], in the assignment of errors on this appeal [R. 195], and in Richfield's brief [Rich. Br., pp. 40-45; 52-94].

We respectfully submit that an inquiry into the underlying reason for the exclusion from the prohibitions of the anti-trust laws is not to be avoided because of the government's assertion that the L. O. operators are not strict agents or employees.

(2) The government contends that the L. O. operators "were regarded and functioned as independent businessmen" [Govt. Br. 44]. The statements offered in support of its contention either do not logically support it or are without adequate foundation in the record.

The government first mentions that there was no consignment but a purchase, and that the operators were not paid commissions [Govt. Br. 44]. No comment is made on the showing in Richfield's brief that the incident of the passage of title is not controlling [Rich. Br. 70-73, 77]; nor is any mention made of the numerous factors discussed in Richfield's brief and enumerated on pages 74 and 75 thereof which demonstrate that the L. O. operators are not customers and that Richfield has a continuing economic interest in such stations and the products handled therein, notwithstanding the passage of title to the products.

The government [Govt. Br. 12, 45] contends that the L. O. operators are independent because they "were held out to the general public as independent dealers". Richfield re-

ferred at times in its radio advertising to "your independent Richfield dealer" without indicating any difference between its legal or economic relationships with the 337 and 3-C dealers on the one hand and the L. O. operators on the other. The testimony concerning Richfield's advertising is contained in the record at pages 660-1 and 669-72. It is clear that the advertising of Richfield's products was general.[2] It was not and could not be framed with the precision and nicety of a legal instrument. It did not alter in one iota the economic position or real relationship of the L. O. operators to Richfield.

The government incorrectly suggests that it was Richfield's common practice to tell the L. O. operator that he was an independent businessman. The government's brief [p. 37] states: "In entering into an L-O arrangement, appellant informs the dealer that he is to be an independent businessman". No finding of any such matter was made by

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[2] The testimony in part was:

The Court: That would cover, you know, those pictures in the newspapers of a man in overalls, middle-aged, and quite nice looking, looks as though he was in the First World [fol. 1253] War, and there you say, "This is the type of man who serves you."

The Witness: We refer to them as "Richfield dealers," your Honor, in all of our advertising.

• • •

Q. (by government counsel) So then I take it, Mr. King, Richfield does not conduct an advertising program just for the benefit of one type of dealer among the three types that we have referred to; is that correct?

A. That is correct. Our advertising is intended for all of these operators and dealers.

Q. And in referring to—

The Court: Well, you have an interest in all three types, and, therefore, you do not distinguish, regardless of any legal distinction, between the type of relationship as between you and these three in your advertising, and you treat them all alike.

The Witness: Well, we would be very foolish, your Honor, if we didn't. [R. 660-1]

the District Court and the only testimony concerning it does not justify the generality of the statement or the exaggerated importance claimed for it.[3] In fact, it is clear beyond question that the L. O. operators as a class (notwithstanding isolated exceptions) knew from the matters of which they were informed prior to their being installed in Richfield's stations that they were to be the very opposite of independent businessmen. (For full discussion of such matters, together with appropriate references to record, see Richfield's Brief, pages 14-16).

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[3] Weston, who was employed by Richfield as a merchandiser in Seattle, Washington from 1940 to 1941 and from 1946 to 1949, testified that he took interested prospective L. O. "dealers" to Gilworth, the Seattle Branch Manager, who would "more or less check to see if they had the capital" and "impress on their minds that they were an independent businessman" (R. 973-4).

This isolated testimony is the basis of the government's similar statements at pages 12, 37, 45 and 50 of its brief.

No similar testimony was given by any of the other merchandiser witnesses called by the government and who testified of practices in interviewing and installing prospective L. O. operators (Miller, R. 1006, Minor, R. 746, Pittman R. 870, or Shewbridge, R. 986); nor was there any similar testimony by any other former Richfield employees called as witnesses by the government; nor was there similar testimony by any of the twenty-four present and former L. O. operators called as witnesses by the government; nor was there similar testimony by the managerial witnesses called by Richfield, namely, King (R. 568, 1562) and Dusto (R. 1718). Certainly Weston's testimony cannot support an inference of a common or general practice.

Furthermore, Weston (as well as the other witnesses above referred to) testified that the prospective operators were told of instructions as to hours of operation, cleanliness of station, manner of operation, etc., all of which would indicate to any prospective operator that his status was not to be that of an independent businessman. Footnote 23 on page 50 of the government's brief suggests that testimony similar to that of Weston's was given by government witnesses Bradford, Hurst and Delong. An examination of their testimony does not so indicate.

The government states "When the station was sold, they (the L. O. operators) took any loss on 'approved' as well as 'non-approved' merchandise" [Govt. Br. 45]. The implication that this was a common practice or occurrence as to approved merchandise cannot be supported by the record. There is no such finding by the District Court; and the record is clear that as to approved merchandise, Richfield either arranged for the incoming operator to acquire the same or Richfield itself took back the merchandise [R. 1595-6, 1726, 975].

(3) The government next makes its "both ways" argument. [Govt. Br. 38, 46-7] It contends, first, that under the arrangement between Richfield and the L. O. operator, Richfield has "avoided" and is "relieved" of numerous liabilities which it might have incurred under an agency or employment relationship;[4] and second, that consequently, it must be determined that Richfield has violated the anti-trust statutes. The government states: "Appellant cannot have it both ways", i. e., both non-liability for workmen's compensation insurance, unemployment taxes, etc. on the one hand and non-violation of the anti-trust laws on the other hand.

This argument has no validity and contains an obvious non-sequitur. The suggestion that the areas and relationships covered by the anti-trust laws are defined in terms of relationships not covered by social security tax laws, state workmen's compensation insurance laws, etc. has no foundation. Similarly, no support can be found for the suggestion that the alternative to non-responsibility for such taxes or insurance is the imposition of a liability under the anti-trust laws. One does not follow from the other.

The non-payment by Richfield of workmen's compensation insurance premiums or social security taxes with re-

[4] Any implication in the government's brief that Richfield's purpose in establishing its relationship with the L. O. operators was to avoid or evade liabilities is without any support in the record [Rich. Br. p. 76].

gard to the L. O. operators does not make independent businessmen of persons who are not otherwise so, nor does it transform into a market what is otherwise merely an outlet to a market.

(4) The government's brief [pp. 47-8] refers to cases stating that common ownership or control of contracting or conspiring corporations does not liberate them from the impact of the anti-trust laws, citing *Timken Roller Bearing Company* v. *United States*, 341 U. S. 593, 598; *Kiefer-Stewart* v. *Seagram & Sons*, 340 U. S. 211, 215; *United States* v. *Yellow Cab Company*, 332 U. S. 218, 227. The inapplicability of these cases and their holdings to the case at bar is discussed in Richfield's brief [pp. 91-3]. The language concerning common ownership and control which was used in the *Yellow Cab* case (and which was thereafter referred to in the *Kiefer-Stewart* and *Timken* cases) was explained as follows in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 523:

> "A subsidiary will in all probability deal only with its parent for goods the parent can furnish. That fact, however, does not make the acquisition invalid. *When other elements of Sherman Act violations are present*, the fact of corporate relationship is material and can be considered in the determination of whether restraint or attempt to restrain exists. That this is the teaching of the Yellow Cab case is indicated by the following quotation:
>
> "'And so in this case, the common ownership and control of the various corporate appellees are impotent to *liberate* the alleged combination and conspiracy from the impact of the Act. * * *'"

Since the L. O. stations are not a legitimate market and the L. O. operators are not independent businessmen, it cannot be said that "other elements of Sherman Act violations are present".

(5) The government asserts [Govt. Br. 50-2] that the fact that Richfield "created" the majority of the L. O.

stations (in excess of 81% thereof) does not give Richfield the right to impose on their operators agreements restraining trade. Richfield has never contended that the reason the L. O. stations do not constitute a market is that Richfield created them. Richfield's contention of the absence of a legitimate market is based on all of the attendant facts and circumstances bearing on its relationship with the L. O. operators. The true significance of Richfield's creation of more than 81% of the L. O. stations is explained in Richfield's opening brief [p. 94].

Finally, it may be noted that the government's brief does not mention or dispute Richfield's contention that the District Court erred in concluding (1) that the issues here involved had been determined in *Standard Oil Company of California* v. *United States*, 337 U. S. 293 [Rich. Br., pp. 78-81], and (2) that the existence of a lease between Richfield and the L. O. operator is determinative that the operator is an independent businessman [Rich. Br., pp. 82-87]. Those two erroneous conclusions are the foundation and support for the District Court's decision of illegality of the L. O. stations. [Opin. R. 71, 77-90]

B. Whether the Restrictions on the L. O. Operators are Unreasonable Under Sec. 1 of the Sherman Act and Whether the Requirements of the Qualifying Clause of Sec. 3 of the Clayton Act Have Been Met.

SHERMAN ACT, SEC. 1

Richfield's brief [95-104] demonstrates that even if it be determined that the relationship between Richfield and the L. O. operators is such that the restrictions are cognizable under the Sherman Act, there nevertheless is no showing of unreasonableness.

The government seeks to justify the total failure of proof of unreasonableness by contending that exclusive dealing contracts are unlawful per se [Govt. Br. 65-8]. It is clear beyond dispute that exclusive dealing contracts are not un-

lawful per se. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522-4.[5]

The government's brief [p. 67] suggests that the *Columbia Steel* case is limited to "the permissibility of a particular vertical integration. Here appellant does not seek to integrate, but to restrain the trade of 2,965 independent businessmen." There are two ready answers to this. First, the opinion in the *Columbia Steel* case refers to more than vertical integration.[6] Second, a similar contention by the government was emphatically rejected in *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 376.

The government suggests [Govt. Br. 67] that the *Yellow Cab* case, involving a conspiracy and intent to monopolize, would justify a holding of illegality per se since Richfield intended to confine the operators of the L. O. stations to Richfield's products. The supposed analogy fails. There is no charge here of monopoly or intent to monopolize. There is no intention here other than that implicit in the making of any exclusive dealing arrangement, which as pointed out above is not illegal per se notwithstanding such intention.

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[5] The government suggests that since the *Columbia Steel* case approved the holding of the *United States* v. *Yellow Cab Co.*, 332 U. S. 218, the *Columbia Steel* case cannot be considered to have determined that "exclusive dealing contracts were never unreasonable per se". [Govt. Br. 66] This interpretation of the *Columbia Steel* case is strained indeed. The opinion in that case states:

> "We do not construe our holding in the Yellow Cab case to make illegal the acquisition by the United States Steel of this outlet for its rolled steel *without consideration of its effect on the opportunities of other competitor producers to market their rolled steel.*" 334 U. S. 495, 521-2

[6] The Court said:

> "Exclusive dealings for rolled steel between Consolidated and United States Steel, brought about by vertical integration *or otherwise*, are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product." 334 U. S. 495, 524.

CLAYTON ACT, SEC. 3

Richfield has asserted that the District Court's determination of substantiality under Section 3 of the Clayton Act cannot be supported under the facts of this case. [Rich. Br., 104-7] Richfield there showed the vital factual differences between this case and *Standard Oil Company of California* v. *United States*, 337 U. S. 293; and Richfield demonstrated that the L. O. stations do not constitute a substantial share of the line of commerce.

The government argues that Richfield's distinction is frivolous. It admits that the test of substantiality is the "*share* of the line of commerce affected". [Govt. Br. 63] It attempts to show substantiality regarding the 1,343 L. O. stations by combining with them the 1,622 independent dealer stations. Thus it states:

> "Here 2,965 retail outlets subject to some 7,500 unlawful agreements, *oral* and written, handle, etc."[7] [Govt. Br. 63]

The 1,622 dealer stations are included in the total on the government's stated premise that each of them is the subject of an oral exclusive dealing agreement. While it is true that the District Court found that there exists an oral exclusive dealing agreement with each of the 337 and 3-C dealers [Finding 33, R. 155], Richfield demonstrated in its brief [pp. 119 & 125-6] that all findings of the existence of oral contracts with independent dealers are clearly erroneous, there being no evidence whatsoever showing an oral agreement with *any* of them. As discussed in Part II of this Reply Brief the government's showing in support of its suggestion that "the essence of the challenged findings" [Govt. Br. 53] may be sustained is wholly inadequate. Un-

[7] The "7,500 unlawful agreements" is a synthetic number arrived at by including in the total all the various written agreements applicable to any particular station and an assumed additional oral agreement with each of the 2,965 stations. See Findings 32 and 33, R. 155.

der these circumstances, the government's use of the dealer stations to bolster the charge of substantiality concerning the L. O. stations is unjustified.

There is no validity in the government's suggestion that Richfield's contention would render Section 3 of the Clayton Act "virtually nugatory in respect of requirements contracts because it would apply only to the very largest suppliers in an industry". [Govt. Br. 64] Richfield has asserted only that in determining substantiality under the rule of the *Standard Oil* case, all factors pertinent to the share or proportion of the affected line of commerce be considered. As stated in the *Columbia Steel* case (334 U. S. 495, 528), "The relative effect of percentage command of a market varies *with the setting in which that factor is placed*".

C. Whether the Relief Ordered by the District Court was Proper.

Richfield has asserted that the injunctive provisions relating to the L. O. stations are unduly onerous in three respects [Rich. Br. 108-116].

Richfield's principal complaint was against Paragraph VI of the judgment which forbids Richfield's terminating any lease on an L. O. station (held by the District Court to be a month to month tenancy) except for breach by the L. O. operator of the written covenants contained in the lease.

The government attempts to justify this arbitrary, punitive, and confiscatory provision by stating that it eliminates "the *in terrorem* effect of the unrestricted cancellation power". [Govt. Br. 71-5] Beyond stating that it is difficult to prove that the motive for the cancellation of an L. O. lease may be the violation by an L. O. operator of restrictions against exclusive dealing [Govt. Br. 72], the government advances no reason why Richfield should be prohibited from terminating the "month to month tenancy" of an L. O. operator (even when the latter is handling Richfield's products exclusively) for any other business reason

such as unprofitableness, desire to use the land for other purposes, etc. The confiscatory nature of the decree shown by Richfield to constitute a fine in an amount not less than $485,000 per year [Rich. Br. 112-114] is passed off lightly by the government as "incidental injury". [Govt. Br. 74]

Richfield also complained of the failure by the District Judge to include in the Richfield decree a qualification, similar to that inserted by him in his decree in the *Standard Oil Company of California* case, so as to permit Richfield to require that Richfield's pumps, tanks and other receptacles be confined to its products. [Rich. Br. 115-16] The government's brief [p. 70] states that Richfield has not indicated sufficiently the precise nature of the important competitive market practices which Standard, Richfield's largest competitor, may continue to utilize. By Paragraph IX of its decree Standard was granted immunity and given a license to continue (both in its own stations, if any, and in stations of independent dealers comparable to the 337 and 3-C stations) the precise practices which Richfield is enjoined from following in its own L. O. stations. The prejudice to Richfield from a competitive standpoint is self-evident. The absence of a showing of "palming off" referred to in the government's brief [p. 70] has no relevance.[8]

II. THE DEALER STATIONS.

A. Whether the Government Proved Its Charges of Oral Exclusive Dealing Contracts and Coercion in Regard to the Dealer Stations.

Richfield's brief demonstrates, we earnestly believe, that the challenged findings of the District Court are clearly erroneous. Richfield's brief [pp. 117-47] shows that there is an almost total absence of evidence or testimony to prove the essential charges of illegality contained in the complaint, i.e., the existence of oral exclusive dealing agreements with each of the 337 and 3-C dealers [Compl. Par.

[8] The factor of "palming off" was not the basis for the inclusion of the qualifying clause in the *Standard* decree (see discussion in Richfield's brief, p. 116, footnote 68).

17-19, R. 6-7] and of coercion to compel dealers "to enter into and adhere" to such oral agreements [Compl. Par. 20, R. 7-8]. The District Court's determination of illegality was predicated upon its findings of the existence of oral exclusive dealing contracts as alleged. (Its findings pertaining thereto are numbers 5, 20, 21, 26, 27, 28, 30, 33, 34, 39, 43, 45, 46, 47 and 48 all of which are attacked in Richfield's assignment of error II-1-a, R. 205.) The government's brief so approaches the problem. The question to be decided in this case, therefore, is whether the findings of oral agreements can be sustained.[9]

The government's brief *first* attempts to support the findings (a) by pointing out some slight additional testimony not mentioned in Richfield's brief and (b) by advancing certain arguments from which it contends that Richfield had a "policy" which the government implies could furnish support for the Court's findings of the existence of oral agreements. *Second*, the government's brief suggests that independent of the findings of oral exclusive dealing agreements, the judgment of illegality as to the dealer stations may be supported on the ground that (a) the written specified-quantity sales contracts are unlawful under its so-called "unlikely" doctrine and (b) that such contracts when combined with painting agreements are illegal per se without regard to the effect on competitors. Each contention will be separately dealt with.

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[9] For illustration, in Finding 21 [R. 149] the District Court found that "Richfield has from March 12, 1937 continuously to the present time entered into written and oral agreements and understandings with the independent operators of the 337 dealer stations. * * * The oral agreements relate to the handling of petroleum products and automotive accessories." In Finding 33 [R. 155] the Court found that Richfield had entered into such an "oral agreement" with *each* of such 337 dealers. Conclusions of Law 2 to 9, inclusive [R. 163-4] recite that the basis of the violation of the Sherman and Clayton Acts is the "written and oral contracts, agreements and understandings".

FIRST: *Government's Contentions Concerning the Findings.*

A. *Additional testimony.* The only testimony or evidence pertaining to the dealer stations referred to in the government's brief and not referred to in Richfield's brief are (a) Ex. 9-A (R. 284), a memorandum written and pertaining to an event in 1940 [Govt. Br. 28], (b) certain of the language of former distributor Duarte [Govt. Br. 29], (c) some of the testimony of former employee Bradford [Govt. Br. 30 & 58], and (d) some of the language of former salesman Scollard [Govt. Br. 32].[10] In the face of Richfield's vigorous attack on such findings, coupled with its itemization of the evidence relevant thereto, it is reasonable to suppose that the government's brief contains reference to all evidence in the record which it believes could support such findings and refute Richfield's attack.

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[10] The limited areas and times to which the testimony of these witnesses relates are shown in Richfield's opening brief at the following pages: Duarte, p. 129, footnote 78, and p. 131, footnote 81; Bradford, p. 128, footnote 78, and p. 134, footnote 83; Scollard, p. 129, footnote 78.

We suggest that a failure to recognize such limitation of the scope of such testimony has led the government to ascribe thereto an exaggerated significance. While Bradford's testimony was limited to the area of Portland, Oregon, during the period prior to 1947, his testimony (which stands alone for the following proposition in a record of over 1200 pages of testimony):

> "Q (By government counsel) * * * The estimates of the maximum and minimum quantities were based on the premise the dealer would buy all of his gasoline from Richfield?
>
> A. Yes." [R. 1108]

is expanded in the government's brief to suggest a general practice by Richfield apparently unlimited as to time or area:

> "The maxima and minima were set by appellant and there was uncontradicted testimony that they were set on the assumption that the dealer would buy all his requirements from Richfield." [Govt. Br. 56]

We respectfully submit that such additional testimony and evidence falls far short of supplying the additional evidentiary support necessary to sustain these critical findings.

B. *Argument re "100% Richfield" policy.* It is the burden of the government's argument [Govt. Br. 38-39, 52-60] that Richfield has continuously, from 1938 to the time of trial, had a "policy" (referred to throughout its brief as a "100% Richfield" policy) relating to all types of stations, and that the existence of such "policy" supports the findings of oral exclusive dealing agreements with each of the existing 337 and 3C dealers.

We submit that the contention of a continuous "100% Richfield" policy starting from the "split-pump" letter of 1938, which died and became meaningless prior to World War II [R. 659, 1636-7], and continuing with regard to the 337 and 3C dealer stations up to the time of trial is fanciful and cannot be supported.[11]

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[11] (a) The Government's chief contention is that Richfield's requirement of exclusive dealing in its L. O. stations, which did continue from 1938 to the time of trial, is the same "100% Richfield" policy, the phrase used in the 1938 letter concerning independent dealer stations. This is nothing but a play on words.

The 1938 split-pump letter concerned only the independent dealer stations, not Richfield's L. O. stations. The letter states: "It will be 100% Richfield or we will withdraw from such accounts, if we have any left, that are now on a split-pump basis". [Ex. 9, R. 284, 658]

The key to the letter's meaning is the word "withdraw". In 1938 Richfield withdrew from forty to fifty dealer accounts [R. 1635-6], i.e., it discontinued sales to those independent dealers. Richfield does not withdraw from any of its own L. O. stations. If the operator thereof handles competitive oil or accessories, Richfield removes the operator and installs another in his place.

The split-pump policy of 1938 cannot be given a free ride up to the time of trial on the vehicle of proof of an admitted and entirely different policy, i. e., Richfield's practices with its L. O. stations.

(b) The government's additional contention concerning the "100% Richfield" policy is based upon the requirements contracts

If the record could bear any reasonable inference that the "split-pump policy" of 1938 (which related only to gasoline and not to any other petroleum products or to automotive accessories, [Finding 28, R. 154]), had been continued to the time of trial, such inference still could not support any finding of oral agreements between Richfield and any dealers without a showing, not here present, of knowledge by the contracting dealers of such policy [Rich. Br. 136-8]. There is no showing in the record of knowledge by any dealer of any such policy.

SECOND: *Government's Contentions of Unlawfulness of Fixed Quantity Contracts.*

A. *The "Unlikely" Doctrine.* After pointing out that the dealers' obligations under the sales contracts were set at

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with the 3-C dealers during the period 1945 to August, 1948. That the requirements contracts were limited to the comparatively few 3-C dealers (182 at one time) and were never applicable to the 337 dealers or their stations need not be labored. (See Richfield's brief, pages 19-24, 31-33 for a full discussion of this matter and of the fact of and reasons for the total discontinuance of requirements contracts with even the 3-C dealers in August, 1948.)

The 200-yard clause contained in the lease from the 3-C dealer to Richfield [Ex. 4, R. 262, 567] has no relevance to the problem of exclusive dealing. Examination of the exhibit shows that the clause refers to property, if any, of the lessor other than the leased premises. No testimony concerning the application, use or effect of this clause was offered by the government at the trial.

(c) The government argues there is significance to Richfield's failure in 1948 to tell the dealers that "the '100% Richfield' policy was no longer applicable and that they were free to handle and display competing goods." [Govt. Br. 39, 55].

There was no occasion to tell the 337 dealers of the elimination of a restriction which had never existed.

The elimination of the restriction of the requirements clause in the 3C contract was called to the attention of the 3C dealers by the alteration of their contracts. [Stip. of Facts, Ex. A, R. 402].

(d) Finally, the government suggests support from the use of painting agreements but it is clear that painting agreements have neither had the purposes nor effect ascribed to them. (See Richfield's brief, pages 22-23, 140-2.)

about 80% of the dealers' anticipated requirements,[12] the government states: "* * * such a contract renders it *unlikely* that the operator will ever be in a position to buy competing products, except sporadically and occasionally." [Govt. Br. 56]

We respectfully submit that if a contract is deemed to be violative of either the Sherman or Clayton Acts upon speculation that it is "unlikely" that the purchaser will be in a position to buy competitive products, no one may safely enter into commercial transactions.

B. *The Illegal per se Doctrine.* The government's brief suggests that a written maximum-minimum sales contract, when used in connection with a painting agreement of the nature here involved (i. e., providing for repayment by the dealer to the supplier of painting costs expended in the event the dealer fails to purchase the agreed specified quantity) is unlawful per se. The government's brief states "In addition, the written maximum-minimum provisions and painting provisions presently applicable to both 3-C and 337 stations *on their face—and quite apart from the testimony as to their practical effect which appellant disputes*—plainly tend, as the district court held, to compel exclusive dealing." [Govt. Br. 69]

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[12] Although the District Court found that the agreed quantities "are usually fixed by it [Richfield] at 80% of the anticipated requirements of the independent operator" [Finding 19, R. 148], it is not to be assumed either that the contract calls for 80% of the dealer's requirements, as suggested in the government's brief [p. 56], or that the specific quantity which is inserted in the contract is intended to represent 80% of the dealer's anticipated requirements. The percentage is used, not as a target or as a "yardstick" [Gov't Br. 67], but as an outside limit.

The sales contracts contain provision not for a percentage of the dealers' requirements, but for a specified quantity. The quantity is determined by negotiation between the dealer and Richfield's salesmen, with the qualification that the negotiated quantity which the dealer obligates himself to purchase is not permitted to exceed 75% of the dealer's past known sales. During the period August, 1948 to the spring of 1950 the instructions referred to 85% as a maximum instead of 75%. For a full discussion, together with appropriate references to the record, see Richfield's brief, pp. 20-22, 31-33.

Since, as pointed out above, an entire requirements agreement which prevents the dealer from buying elsewhere is not illegal per se, it is difficult to perceive how a specified quantity contract could have such character.

Richfield respectfully submits that the judgment appealed from should be reversed.

ROBERT E. PARADISE,
WILLIAM J. DEMARTINI,
Attorneys for Appellant.

KRYSTAL & PARADISE,
Of Counsel.

FILED
MAY 3 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1951.
No. 395

RICHFIELD OIL CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

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October Term, 1951.

No. 395

RICHFIELD OIL CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

Appellant, Richfield Oil Corporation (herein called "Richfield"), presents this petition for a rehearing of the above entitled cause on the grounds hereinafter stated.

Basis of the Supreme Court's Decision.

On April 21, 1952, the Supreme Court affirmed the judgment of the District Court on the ground that "the issues raised by this appeal are substantially the same as those decided in *Standard Oil Company v. United States,* 337 U. S. 293, 1949."

Richfield respectfully submits that even if the *Standard* case is held to be the basis of the determination of illegality of Richfield's restrictions on the L. O. operators, nevertheless this appeal has raised two additional vital issues[1]

[1]These issues were raised in Richfield's assignments of error 11(c), 11(d) and 12 [R. 204-5] and were discussed in Richfield's Op. Br. 46-7, 108-116.

regarding the confiscatory and discriminatory nature of the injunction in this case, neither of which issues was decided in the *Standard* case in a manner adverse to Richfield's contentions. Richfield submits further that consistency with the *Standard* decision as well as regard for this Court's "obligation"[2] to correct erroneous provisions of anti-trust decrees requires either reversal or modification of the District Court's judgment.

I.

Confiscatory and Punitive Provisions of Decree.

Each L. O. lease [Ex. 1G, R. 251] contains provision for termination by either Richfield or the operator on twenty-four hours' notice, with or without cause. None of the leases provides for a fixed term or for a stated expiration date; and accordingly, each will continue until terminated by notice.

Paragraph VI of the judgment (copied in Appendix "A" hereto) enjoins Richfield from exercising for any reason the twenty-four hour termination clause and from cancelling any L. O. lease on less than thirty days' written notice. It further enjoins Richfield from exercising

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[2]In *United States v. United States Gypsum Company*, 340 U. S. 76, 89, the Court said:

> "Notwithstanding our adherence to trial court responsibility in the molding of a decree as the wisest practice and the most productive of good results, we have never treated that power as one of discretion, subject only to reversal for gross abuse. Rather we have felt an obligation to intervene in this most significant phase of the case when we concluded there were inappropriate provisions in the decree."

such "30-day cancellation privilege" excepting *"only for a breach of any of the written covenants contained in any written lease"* with an L. O. operator.

(a) *Paragraph VI of the Richfield judgment is both punitive and confiscatory. It violates the standards established for decrees in anti-trust cases, i. e., "effective and fair enforcement, not punishment" or "penalties."* (*United States v. National Lead Co.*, 332 U. S. 319, 338 (1947); *Hartford-Empire Co. v. United States*, 323 U. S. 386, 409, 414 (1945).)

The effect of this decree will be to deprive Richfield of the right of terminating these "month to month" tenancies for any reason or purpose however wholly divorced from that of removing an operator who fails or refuses to handle Richfield's products in a station owned by Richfield. The decree changes the lease from one terminable by either party on twenty-four hours' notice to one enduring for such period as may be selected by the particular L. O. operator, for his lifetime if he so elects.

The confiscatory nature of the decree is obvious from the fact that the rental payable by any L. O. operator is substantially (at least 33⅓%) less than the fair rental value of the station.[3] Richfield is required to continue to lease its stations to any operators who choose to comply with the written covenants of the lease (which are limited

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[3]See Statement of Facts in Rich. Op. Br., 17-18, containing appropriate references to the record.

largely to maintenance of the premises in repair and payment of the relatively nominal rent) and thus is required to "dedicate," to the extent of the loss of fair rental value, the stations to the L. O. operators. This result is directly contrary to this Court's holding in *Hartford-Empire Co. v. United States,* 323 U. S. 386, 414, and is tantamount to a fine on Richfield of not less than $485,000.00 per year (Rich. Op. Br., 112-113).

(b) *The validity of such injunction was not an issue either raised or decided in the Standard case.*

The judgment (by the same District Court) in the *Standard* case contained no comparable injunction.[4] Standard was merely enjoined, *subject to the emasculating qualification discussed in Point II hereinafter,* from enforcing the exclusive dealing provisions in any of its contracts or agreements [Par. VI of the *Standard* judgment]. The judgment stated that the determination of illegality did not extend to other and separable provisions of Standard's agreements or subleases [Pars. IV and V of the *Standard* judgment]. Standard *was not* enjoined from exercising, freely and without limitation, any termination privileges contained in any of the 1800 subleases there involved.[5]

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[4]Appendix B to this petition contains a copy of the judgment in the *Standard* case taken from the Transcript on Appeal to the United States Supreme Court, No. 279, Oct. Term, 1948, pp. 188-193.

[5]Standard's contracts were for varying specified terms or from year to year. The year to year instruments were terminable every six months upon thirty days' advance notice. (*Standard Oil Company of California v. United States,* 337 U. S. 293, 296.)

(c) *The injunction, as framed, is contrary to this Court's decision in the Standard case.*

The Court there recognized the propriety of Standard's making agents or employees of former independent service station dealers.[6] Nevertheless, by this injunction as framed, Richfield will be enjoined from terminating the L. O. leases to install in stations owned and built by it either salaried employees or agents.

II.

Richfield's Competitive Disability Resulting From Differences in Standard and Richfield Decrees.

Not only does the Richfield decree in effect confiscate Richfield's L. O. stations with no comparable treatment to any of Standard's stations, however operated, but the District Judge further refused to include in the Richfield decree any provision similar to the exculpatory paragraph

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[6]The Court said (337 U. S. 293, 310):

". . . Before the system of requirements contracts was instituted, Standard sold gasoline through independent service-station operators as its agents, and it might revert to this system if the judgment below were sustained. Or it might, as opportunity presented itself, add service stations now operated independently to the number managed by its subsidiary, Standard Stations, Inc. From the point of view of maintaining or extending competitive advantage, either of these alternatives would be just as effective as the use of requirements contracts, although of course in so far as they resulted in a tendency to monopoly they might encounter the anti-monopoly provisions of the Sherman Act. See United States v. Aluminum Co. of America, 148 F. 2d 416 (CCA(2) Cir.)."

During the oral argument of this cause on April 2, 1952, counsel for the government, the Hon. Asst. Attorney General, advised the Court in response to questions by the Chief Justice and by Mr. Justice Jackson that if the L.O. operators were employees of Richfield, the anti-trust laws would not apply.

in the *Standard* judgment.[7] Paragraph IX expressly permits Standard to continue to require exclusive dealing in Standard's products in all equipment owned by Standard whether located in stations owned by Standard or by the service station dealers themselves and regardless of whether the relationship between Standard and the dealer is that of supplier and customer or principal and agent or otherwise.

The District Court denied Richfield's motion for a similar provision [R. 192-3] even to the limited extent of Richfield's equipment located in stations owned by it. These stations were established by Richfield because of its inability to compete successfully for the business of the established independent dealers (Rich. Op. Br., 8-9, 12). This arbitrary ruling, which subverts the purpose of the anti-trust laws by using them as a supposed justification to prevent Richfield from competing, is the basis of assignment of error No. 12 [R. 204]. This issue (discussed in Rich. Op. Br. 115-16, and in Rich. Rep. Br., 12) could not have been raised or decided in the *Standard* case.

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[7]The decree in the *Standard* case contains the following provision:

"IX.

"Nothing contained in this judgment shall enjoin or restrain either defendant from selling or contracting to sell petroleum products and/or automotive accessories including such products as are sponsored by defendants, to independent dealers on the condition that any pump or tank or other container or receptacle for such products, furnished by defendant and marked as such to an independent dealer, shall be used solely for the storing, handling or dispensing of defendant's petroleum products and to prescribe by agreement or regulations not inconsistent with the provisions of this decree, for the stortage, handling, or dispensing of such products." (See Appendix B to this petition.)

If the *Standard* case determines the issues in this case,[8] then the decree against Richfield should not be more onerous than that framed by the same District Judge against Standard. Standard operates throughout Richfield's marketing area, is much larger than Richfield and is Richfield's chief competitor. A decree which severely penalizes Richfield to the competitive advantage of Stand-

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[8]Petitioner respectfully submits that no other decision of the Supreme Court or any inferior Court has ever determined illegality under the anti-trust laws under facts or circumstances here involved disclosing, insofar as the L. O. operators are concerned, a relationship far removed from that of supplier and customer. All prior cases involving comparable relationships have determined there was no violation of the anti-trust laws.

Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568 (1923);

United States v. General Electric Co., 272 U. S. 476 (1926);

Appalachian Coals, Inc. v. United States, 288 U. S. 344, 360, 361 (1933);

Curtis Publishing Co. v. Federal Trade Commission, 270 Fed. 881 (C. C. A. 3, 1921);

Pictorial Review Co. v. Curtis Publishing Co., 255 Fed. 206 (D. C. N. Y., 1917).

The *Standard* case did not change the law established by the cases above listed. The *Standard* case dealt with the simple relationship of supplier and customer; and the customer was both assumed by the Court and acknowledged by the parties to be "an independent service station dealer." Whether the L. O. operators are "independent service station dealers" was not an issue in the *Standard* case but was the primary issue in the Richfield case. (Rich. Op. Br., 78-81.)

Petitioner submits further that the *Standard* case did not decide, as did the District Court here, that fixed quantity contracts (providing for quantities substantially less than the purchasers' requirements) violate the anti-trust laws even when used in connection with painting agreements providing for reimbursement by the purchasers of painting costs if they fail to purchase the specified quantities. See discussion of the *Standard* case in Lockhart and Sacks', "The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act," 65 Harvard Law Review 913 (April, 1952), especially at 920, where this aspect of the District Court's decision in the *Richfield* case is discussed.

ard demonstrates a gross abuse of discretion.[9] A showing of a "gross abuse of discretion" is beyond that necessary to require intervention by this Court (see footnote 2 above).

Richfield respectfully urges that this petition for a rehearing be granted and that the judgment of the District Court be, upon further consideration, reversed.

Respectfully submitted,

ROBERT E. PARADISE,
WILLIAM J. DE MARTINI,
Attorneys for Petitioner.

KRYSTAL & PARADISE,
Of Counsel.

Certificate of Counsel.

The undersigned counsel for the above named petitioner do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

ROBERT E. PARADISE,
WILLIAM J. DE MARTINI.

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[9]This Court has recognized the wisdom of formulating anti-trust decrees in such fashion as to preserve the competitive abilities of component members of an industry. (*Ford Motor Co. v. United States,* 337 U. S. 303 (1948).)

APPENDIX "A."

Paragraph VI of the Judgment provides as follows:

"Richfield, its successors or assigns, its officers, directors, agents, representatives, and all persons and corporations acting or claiming to act on its behalf, are hereby perpetually enjoined from exercising the 24-hour termination clause contained in any lease which it now has with or which is in effect between itself and any independent dealer operating a retail outlet under an L-O type of arrangement with defendant, and is perpetually enjoined from cancelling any lease which it now has with or which may be in effect between itself and any independent dealer operating a retail service station under the L-O type of arrangement on less than 30-days' written notice to any such dealer. Such 30-day cancellation privilege may be exercised by defendant only for a breach of any of the written covenants contained in any written lease entered into between Richfield and an indpendent dealer operating a retail outlet under the L-O type of arrangement and by written notice sent by registered mail to such dealer advising him of such alleged breach and notice of cancellation therefor. A copy of any such written notice of cancellation shall be sent by registered mail to the Attorney General of the United States or to his duly authorized representative designated by the Attorney General in writing to Richfield at the time said written notice of cancellation is sent to such dealer by defendant." [R. 168.]

APPENDIX "B."

Final Judgment in the *Standard* case, taken from the Transcript on Appeal to the United States Supreme Court, No. 279, Oct. Term, 1948, pages 188-193:

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Honorable Leon R. Yankwich, Judge.

No. 6159-Y

UNITED STATES OF AMERICA, Plaintiff

v.

STANDARD OIL COMPANY OF CALIFORNIA AND STANDARD STATIONS, INC., Defendants

FINAL JUDGMENT—Filed June 30, 1948

The court having rendered its opinion herein on June 7, 1948; having duly considered the proposals of the parties as to its judgment, and having filed its findings of fact and conclusions of law, wherein the defendants herein were found to have violated Section 1 of the Act of Congress of July 2, 1890, as amended, commonly known as the Sherman Act, and Section 3 of the Act of Congress of October 15, 1914, as amended, commonly known as the Clayton Act,

It is hereby ordered, adjudged, and decreed as follows:

I

As used herein, "Standard" refers to the defendant Standard Oil Company of California; "Standard Stations" refers to the defendant Standard Stations, Inc.

As used herein, the term "retail outlet" refers to any [fol. 348] service station or garage at which "petroleum products" and/or "automotive accessories" manufactured or "sponsored by" defendant Standard, or Standard Stations are sold or distributed by an "independent dealer."

As used herein, the term "independent dealer" refers to the operator of any "retail outlet who operates such retail outlet as an independent business enterprise and not as an employee or agent of defendant Standard or Standard Stations.

As used herein, the term "petroleum products" refers to products obtained or manufactured from natural gases or crude oil by any process and sold or used as a fuel or lubricant for automotive vehicles, together with miscellaneous oils and compounds derived from such natural gases or crude oils and designated for various specific uses and includes such petroleum products as are manufactured or "sponsored by" defendants and sold by defendants "Standard" or "Standard Stations" at any retail outlet operated by said defendants or either of them.

As used herein, the term "automotive accessories" refers to replacement parts and articles other than "petroleum products" used on or in the servicing or repairing of automotive vehicles and includes tires, tubes, batteries, spark plugs, oil filters, oil filter cartridges, fan belts, battery cables, auto lamp bulbs, fuses, windshield wipers and blades, tire repair and vulcanizing kits, anti-freeze preparations, tire chains, waxes and polishes and other like items and includes such "automotive accessories" as are manufactured or "sponsored by" defendants and sold by defendants "Standard" or "Standard Stations" at any retail outlet operated by said defendants or either of them.

The term "sponsored by," as used herein, refers to petroleum products and/or "automotive accessories" which are not manufactured or produced by defendants "Standard" and/or "Standard Stations."

II

Defendants Standard and Standard Stations have entered into contracts which unreasonably restrain interstate trade and commerce in petroleum products and automotive accessories in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 26 Stat. 209; 15 U. S. C. 1, [fol. 349] commonly known as the Sherman Act.

III

Defendants Standard and Standard Stations have entered into contracts which substantially lessen competition and tend to create a monopoly in the sale and distribution of petroleum products and automotive accessories in violation of Section 3 of the Act of Congress of October 15, 1914, as amended, 38 Stat. 731; 15 U. S. C. 14, commonly known as the Clayton Act.

IV

All of the provisions of any Dealer Agreement (Government's Exhibit No. 1), Distributor Agreement (Government's Exhibit No. 2), Petroleum Products and Equipment Agreement (Government's Exhibit No. 3), Dealer Agreement TBA (Government's Exhibit No. 4), Sublease Agreement (Government's Exhibit No. 5), and all provisions of like or similar import or effect either expressed or implied in any other agreement or instrument between defendants Standard and/or Standard Stations and any independent dealer which contain the condition, agreement or understanding that said independent dealer shall pur-

chase or acquire for sale all his requirements of petroleum products and/or automotive accessories which are used or sold or bought to be used or sold by said independent dealer at a retail outlet from defendants, or either of them ,are hereby adjudged unlawful and declared illegal and void. This declaration of illegality does not extend to other and separable provisions of said agreements or subleases which do not contain any such or similar condition, agreement or understanding.

V

All of the provisions of any oral agreement, arrangement or understanding between defendants Standard and/or Standard Stations and any independent dealer which contain the condition, agreement, or understanding, expressed or implied, that said independent dealer shall purchase or acquire for sale all his requirements of petroleum products and/or automotive accessories which are used or sold, or bought to be used or sold by said independent dealer at a retail outlet from defendants, or either of them, [fol. 350] are hereby adjudged unlawful and declared illegal and void. This declaration of illegality does not extend to other and separable provisions of any agreements or subleases which do not contain any such or similar condition, agreement or understanding.

VI

The defendants Standard and Standard Stations, their successors or assigns and their officers, directors, agents, representatives, and all persons or corporations acting or claiming to act on their behalf be and they are hereby perpetually enjoined from entering into, or enforcing the provisions of any contract, agreement, or understanding, written or oral, expressed or implied, with any independent

dealer or from inducing or compelling, or attempting to induce or compel, by any means whatever, any independent dealer to enter into any contract, agreement, or understanding, written or oral, expressed or implied, which requires:

(a) an independent dealer to secure all of his requirements of petroleum products from defendants or either of them or which prevents him from handling or acquiring for sale petroleum products from sources other than the defendants;

(b) an independent dealer to secure all of his requirements of any one or more automotive accessories from or through defendants or either of them, or which prevents him from handling or acquiring for sale any automotive accessories from sources other than defendants.

VII

Defendants Standard and Standard Stations, their successors or assigns, and their officers, directors, agents, representatives and all persons or corporations acting or claiming to act on their behalf be and they are hereby perpetually enjoined from selling or attempting to sell any petroleum products or any automotive accessories to any independent dealer on the condition

(a) that said independent dealer shall purchase other [fol. 351] petroleum products or automotive accessories from the defendants, or either of them;

(b) that said independent dealer shall not handle or sell at a retail outlet petroleum products and/or automotive accessories other than those sold or sponsored by defendants.

VIII

Within sixty days after this judgment shall become operative and go into effect, defendants shall send written notice by registered mail to each independent dealer with whom a defendant then has existing written or oral contractual relations of the provisions of this decree in such form as is first approved by the attorneys for the plaintiff or by the court in the event the attorneys for the plaintiff and the defendants are unable to agree on the form of such written notice.

IX

Nothing contained in this judgment shall enjoin or restrain either defendant from selling or contracting to sell petroleum products and/or automotive accessories including such products as are sponsored by defendants, to independent dealers on the condition that any pump or tank or other container or receptacle for such products, furnished by defendant and marked as such to an independent dealer, shall be used solely for the storing, handling or dispensing of defendant's petroleum products and to prescribe by agreement or regulations not inconsistent with the provisions of this decree, for the storage, handling, or dispensing of such products.

X

Nothing contained in this judgment shall enjoin or restrain either defendant from freely selecting independent dealers to whom it will sell or contract to sell any petroleum products or automotive accessories including any such products sponsored by defendant or from declining or refusing to sell or contract to sell any petroleum products or automotive accessories including any such products sponsored by defendants, to any independent dealer

provided such refusal to deal on the part of the defendants or either of them is not based on the refusal of the independent dealer [fol. 352] to accept conditions prohibited by this decree.

XI

The enforcement of this judgment is stayed until the expiration of six (6) months from the date of the entry of this judgment and, in the event an appeal is taken from this judgment or any part thereof, the enforcement of this judgment is stayed until the expiration of six (6) months from the date such appeal is finally determined.

XII

For the purpose of securing compliance with this judgment and for no other purpose, any duly authorized representative or representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on notice reasonable as to time and subject matter to either or both defendants, made to its principal office at San Francisco, California, and subject to any legally recognized privilege, be permitted (1) access in the presence of defendant's counsel or other representative during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this judgment; (2) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding such matters, provided, however, that no information obtained by the means provided in this paragraph shall be divulged

by the Department of Justice to any person other than a duly authorized representative of such Department except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law.

XIII

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions [fols. 353-354] as may be necessary or appropriate for the construction or carrying out of this judgment, for the amendment, modifications or termination of any of the provisions thereof, for the enforcement of compliance herewith and for the punishment of violations thereof.

XIV

Judgment is entered against the defendants for all costs to be taxed in this proceeding.

(S.) Leon R. Yankwich, United States District Judge.

Dated: June 30, 1948.